Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1995

ALBERTO SAN PEDRO,

Petitioner,

vs.

THE UNITED STATES OF AMERICA, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Does the Due Process Clause require a federal court to enforce a promise made by the Office of the United States Attorney to an alien criminal defendant as part of a plea bargain that this criminal defendant would not be deported, when the Immigration and Naturalization Service seeks to deport that defendant years after that defendant complied with the terms of his plea bargain and affirmatively uses that defendant's end of the bargain against him?

2. Has Congress given the United States Attorneys authority to promise an alien criminal defendant that this criminal defendant would not be deported, when that promise is made during the course of a criminal prosecution to obtain a plea-bargained guilty plea?

LIST OF PARTIES

United States of America

United States Attorney for the Southern District of Florida
[Roberto Martinez at the time of the filing of the law suit]

District Director of the Immigration and Naturalization Service for the Miami District, Department of Justice
[Carol B. Chase at the time of the filing of the law suit]

Director for the Executive Office for Immigration Review, Department of Justice
[David L. Milhollan at the time of the law suit]

Office of the Immigration Judge in Miami, Florida, Executive Office for Immigration Review, Department of Justice
[Bruce W. Solow at the time of the filing of the law suit]

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PETITION FOR A WRIT OF CERTIORARI

The petitioner, Alberto San Pedro, petitions this Court to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINION BELOW

The opinion of the court of appeals is published at 79 F.3d 1065. That opinion is reproduced in the appendix to this petition.

BASIS FOR JURISDICTION

The opinion of the lower appellate court was filed on April 9, 1996.

This Court has jurisdiction to review a decision of a United States Court of Appeals pursuant to 28 United States Code Section 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the Constitution of the United States provides:

> No person shall . . . be deprived of life, liberty, or property, without due process of law;. . . .

Title 8 United States Code Section 1103(a) provides in pertinent part:

> The Attorney General shall be charged with the administration and enforcement of this Act and all other laws relating to the immigration and naturalization of aliens,. . . . * * * He is authorized, . . . to delegate . . . to any officer or employee of the Department of Justice in his discretion any of the duties and powers imposed upon him in this Act; he may require or authorize any employee of . . . the Department of Justice to perform or exercise any of the powers, privileges, or duties conferred or imposed by this Act or regulations issued thereunder upon any other employee of the Service. * * *

Title 8 United States Code Section 1329 provides in pertinent part:

> The district courts of the United States shall have jurisdiction of all causes, civil and criminal, arising under any of the provisions of this title. It shall be the duty of the United States attorney of the proper district to prosecute every such suit when brought by the United States. * * *

Title 18 United States Code Section 3583(d) provides in pertinent part:

> * * * If an alien defendant is subject to deportation, the court may provide, as a condition of supervised release, that he be deported and remain outside the United States, and may order that he be delivered to a duly authorized immigration official for such deportation.

Title 28 United States Code Section 547 provides in pertinent part:

> Except as otherwise provided by law, each United States attorney, within his district, shall –
>
> (1) prosecute for all offenses against the United States;
>
> (2) prosecute or defend, for the Government, all civil actions, suits or proceedings in which the United States is concerned;. . . .

STATEMENT OF THE CASE

Alberto San Pedro filed a civil law suit against the United States of America, which, simply stated, sought to enforce an alleged condition of a plea bargain that Mr. San Pedro had entered with the United States Attorney for the Southern District of Florida in a prior criminal prosecution of Mr. San Pedro. In this law suit, Mr. San Pedro requested that the Immigration and Naturalization Service in the Department of Justice be ordered not to pursue a recent effort to deport him in violation of the plea-bargained condition that the United States of America would not deport him. The complaint asserted that the district court had jurisdiction pursuant to Title 8 United States Code Section 1329 and Title 28 United States Code Sections 1331, 1361 and 2201.

This case terminated, because the trial court granted a summary judgment to the Government.[1] In its first order, the trial court ruled that the doctrine of estoppel

[1] The trial court entered two orders. Both of those orders are reproduced in the appendix to this petition.

did not bar the Government from seeking to deport Mr. San Pedro, because estoppel does not apply to the Government when it acts in its sovereign capacity. That court held as a matter of law that both plea bargaining within the context of a criminal prosecution and deportation of an alien were acts committed within the sovereign capacity of the United States Government. In its second order, the trial court determined that the Attorney General has the power to promise a criminal defendant that he or she will not be deported. This authority can be delegated to the Department of Justice, as well as the Immigration and Naturalization Service. Because the prosecutors, who negotiated the plea bargain with Mr. San Pedro, never obtained authorization from the Department of Justice to negotiate concerning deportation, that Office of the United States Attorney did not have the authority to promise Mr. San Pedro that he would not be deported.

Because this case was decided prior to trial on the Government's motions for a summary judgment, all of the facts must be taken in a light most favorable to Mr. San Pedro.[2] For the purpose of this petition, those facts may be stated tersely as follows:

Mr. San Pedro is a citizen of Cuba and has been a lawful permanent resident of the United States since May 2, 1956. In the year 1988, the United States Government

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[2] This Court need not concern itself with conflicting facts, when evaluating this petition for a writ of certiorari. This Court must presume correct the version of any disputed issue of fact that supports the party against whom summary judgment was granted. *Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451 (1992).

sued Mr. San Pedro criminally, indicting him for three crimes.

At that time, the Office of the United States Attorney for the Southern District of Florida was in the process of conducting a criminal investigation of corruption within the government of the City of Hialeah, Florida and was focusing on the conduct of the mayor of that city.[3] Mr. San Pedro negotiated a plea agreement with the Government which subjected him to incarceration. The significance of this investigation is underscored by the fact that the United States Attorney, himself, conducted these plea negotiations with another Assistant United States Attorney, who was the Chief Assistant of the Public Corruption Division of that office. During those negotiations, Mr. San Pedro was concerned with his future immigration status. As a consequence, oral representations were made to Mr. San Pedro that he would not be deported. Mr. San Pedro reasonably believed this nondeportation promise to be part of his plea-bargain agreement. In addition to agreeing to cooperate with the Government in its investigation, Mr. San Pedro waived his then-pending appeal in an appellate court of the State of Florida, in which appeal Mr. San Pedro sought to overturn a State of Florida trial court conviction for three crimes. Mr. San Pedro relied on all of the Government's assurances, when he entered his guilty plea.

The United States Attorneys and their assistants are officers of the Department of Justice. Unknown to Mr. San

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[3] Subsequently, the Government obtained a conviction of the mayor. That conviction was reversed on appeal. *United States v. Martinez*, 14 F.3d 543 (11th Cir. 1994). Following two retrials that resulted in mistrials because of inability of the Government to obtain a unanimous verdict, the Government decided to drop its prosecution of the mayor.

Pedro, neither the United States Attorney for the Southern District of Florida nor any of his assistants contacted anyone in the Department of Justice in Washington D.C. to obtain actual approval for the prosecution's promise not to deport Mr. San Pedro. There is no evidence that any of the conditions of Mr. San Pedro's plea agreement were approved by anyone outside the Office of the United States Attorney.

Mr. San Pedro received a federal sentence, which he served completely. Mr. San Pedro fully cooperated with the Government and did not in any way breach his obligations under his plea agreement. Mr. San Pedro's contribution to this corruption investigation was substantial, truthful and invaluable.[4]

Approximately five months after Mr. San Pedro entered his guilty plea and two days after he was released on parole from a federal prison in service of his federal sentence, the Immigration and Naturalization Service of the Department of Justice issued an order to show cause why Mr. San Pedro should not be deported. Deportation was predicated on two State of Florida criminal convictions from the year 1971 and the recent State of Florida convictions the appeal of which Mr. San Pedro had waived as a condition of his federal guilty plea

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[4] This description of Mr. San Pedro's efforts was a factual finding by another federal judge in other earlier litigation between the Government and Mr. San Pedro. *United States v. San Pedro*, 781 F. Supp. 761 at 765 (S.D. Fla. 1991). This latter opinion was made Exhibit 2 to the civil complaint that initiated the litigation now before this Court. As such, it is part of the factual background of this case.

agreement. At that time and for several years thereafter, the Immigration and Naturalization Service did not proceed to deport Mr. San Pedro.

After Mr. San Pedro's release from prison and while Mr. San Pedro was still cooperating with the Federal Government, different law enforcement officers attempted to interest the Federal Government in another prosecution of Mr. San Pedro. After inter-office meetings, the Office of the United States Attorney determined that Mr. San Pedro's plea agreement foreclosed any thought of another prosecution and also determined that Mr. San Pedro had not breached his plea agreement. Nevertheless, certain Assistant United States Attorneys obtained new indictments of Mr. San Pedro on the theory that he had committed perjury at a grand jury investigation of the crimes that were the subject of the new effort to prosecute Mr. San Pedro and that, therefore, Mr. San Pedro breached his plea agreement and could now be prosecuted for those crimes. Mr. San Pedro was exonerated of the perjury charges. Then, in a forcefully worded opinion, which was embarrassing to the Government, a district court judge dismissed the remaining prosecution on the basis that Mr. San Pedro did not breach his plea agreement and on the basis that the Government breached its duty of good faith and fair dealing with Mr. San Pedro.[5]

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[5] The complete history of this prior litigation is set out in detail in the published trial court opinion, *United States v. San Pedro*, 781 F. Supp. 761 (S.D. Fla. 1991). This latter opinion was made Exhibit 2 to the Civil complaint that initiated the litigation now before this Court. As such, it is part of the factual background of this case.

Approximately one year after the Government's loss of its indictment, the Immigration and Naturalization Service filed the several-years-old order to show cause, thereby seeking to obtain deportation of Mr. San Pedro in violation of the plea agreement that had been entered into between the Office of the United States Attorney for the Southern District of Florida and Mr. San Pedro.

As previously stated, the federal trial court granted summary judgment in favor of the Government. In a split decision, the lower appellate court affirmed. Rejecting contrary decisions from two other federal circuits, the majority of the panel held that Mr. San Pedro could be deported.

The Immigration and Naturalization Service is presently engaged in the process of obtaining an order directing that Mr. San Pedro be deported.

REASONS FOR GRANTING THE PETITION

On its face, the lower appellate court's opinion, *San Pedro v. United States*, 79 F.3d 1065 (11th Cir. 1996), expressly conflicts with the decisions of the Eighth and Ninth Circuits in *Thomas v. I.N.S.*, 35 F.3d 1332 (9th Cir. 1994) and *Margalli-Olvera v. I.N.S.*, 43 F.3d 345 (8th Cir. 1994). That conflict among circuits concerns the issue of whether Congress has granted the various offices of the United States Attorney the authority to promise a criminal alien defendant that he will not be deported, when doing so as part of the plea bargaining process. This case has an even more important reason for being accepted for

review. All three decisions conflict with prior precedent of this Court on plea-bargained guilty pleas.

1. The Lower Appellate Court's Opinion Substantially Undermines This Court's Precedent On Plea Agreements.

This is a criminal case in civil clothing. The Immigration and Naturalization Service has challenged the authority of a coequal branch of the Justice Department to impinge on its authority in the field of immigration. Consequently, that agency has pursued a particular perspective that has everyone failing to see the forest for the trees.

The promise at issue in this case was not made in the context of a pending civil deportation proceeding initiated by the Immigration and Naturalization Service. Rather, this promise was made in the context of a pending federal criminal prosecution. In that context, all criminal defendants are protected by the Due Process Clause of the Constitution of the United States, as construed by decisions of this Court.

From the perspective of this Court's decisions, the promise made to Mr. San Pedro that he would not be deported was an unfulfilled, but fulfillable, promise.[6] *See Mabry v. Johnson*, 467 U.S. 504 at 508-509 (1984) (categorizing different types of inducements that would undermine

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[6] The situation would be different, if the promise was made by a state prosecutor during a criminal prosecution in a state court.

the validity of a guilty plea derived from a plea agreement).

The prosecution in this case was conducted by the United States Government, which is the same sovereign that controls the issue of deportation of aliens. *Grafton v. United States,* 206 U.S. 333 at 354 (1907) ("An offense against the United States can only be punished under its authority and in the tribunals created by its laws[.]"); *United States v. Valenzuela-Bernal,* 458 U.S. 858 at 864 (1982) (sovereign power to regulate immigration has been entrusted by Constitution to Federal Government); *Hampton v. Mow Sun Wong,* 426 U.S. 88 at 101 n. 21 (1976) (authority to control immigration is vested solely in the Federal Government).

Congress has enacted no statute imposing any limitation on the power of the Department of Justice to plea bargain in a criminal case regarding deportation. Consequently, Congress has not forbidden a federal prosecutor to promise a criminal defendant that he or she will not be deported, as a condition for obtaining a plea agreement.

Congress has affirmatively stated that, in a federal district court, the Office of the United States Attorney is the spokesman for the Department of Justice in both criminal prosecutions and immigration matters. 8 U.S.C. § 1329; 28 U.S.C. § 547. "The prosecutor's office is an entity and as such it is the spokesman for the Government. A promise made by one attorney must be attributed, for these purposes to the Government." *Giglio v. United States,* 405 U.S. 150 at 154 (1972).

This Court has held that, "when a plea rests in any significant degree on a promise or agreement of the prosecutor, . . . , such promise must be fulfilled." *Santabello v. New York*, 404 U.S. 257 at 262 (1971).

From his end, Mr. San Pedro gave the Government the full benefit of their bargain. Among other things, Mr. San Pedro forever gave up the right to appeal a state court criminal judgment. The Government did more than disavow its end of that bargain. With a cruel twist of the knife, the Government is using those non-appealed state criminal convictions as a primary basis to expel him from the country in which he has lived for forty years.

In this case, the Immigration and Naturalization Service sought to disregard a fulfillable promise. The Immigration and Naturalization Service is engaged in nothing more than a turf war with another branch of the Department of Justice. It is the Immigration and Naturalization Service, not the Constitution, that must yield in that battle. This Court has held that the judiciary will intervene in the deportation process when required by the Constitution. *Fok Young Yo v. United States*, 185 U.S. 296 at 302 (1902).

This perspective is a compelling reason to revisit the long-established and unchallenged pronouncement in *Santabello v. New York, supra.* However, the battlefield set up by the Immigration and Naturalization Service also contains a fertile and independent justification for reviewing this case.

2. Irreconcilable Conflict Of Decisions Should Be Resolved On An Important Question At The Intersection Of The Fields Of Immigration Law And Criminal Law.

The Immigration and Naturalization Service has taken the position that a federal prosecutor has no authority to promise an alien that he or she will not be deported. That agency focuses on Title 8 of the United States Code. There is a conflict between federal circuits on this issue. The Eighth and the Ninth Circuits have found that Congress has granted implied authority to the Office of the United States Attorney to bind the Immigration and Naturalization Service during the course of a federal criminal prosecution. *Thomas v. I.N.S.*, 35 F.3d 1332 (9th Cir. 1994); *Margalli-Olvera v. I.N.S.*, 43 F.3d 345 (8th Cir. 1994). In this case, the Eleventh Circuit has rejected the reasoning of those two courts. *San Pedro v. United States*, 79 F.3d 1065 (11th Cir. 1996).

The Eighth and the Ninth Circuits have held that the general power granted by Congress to the Office of the United States Attorney to conduct criminal prosecutions, 28 U.S.C. § 547, is the statutory source of this implied grant of authority. The position of those two courts is even stronger than they recognized. Congress not only granted United States Attorneys the power to speak for the Government in criminal cases of all kinds before a federal district court, but also granted United States Attorneys the power to speak for the Immigration and Naturalization Service in federal district court – doing so in a statute that is part of Title 8, itself, of the United States Code. 8 U.S.C. § 1329. That is not all. Criminal sentencing has historically been the exclusive domain of a

federal prosecutor. Since the year 1984, Congress has made deportation a consideration during federal criminal sentencing. 18 U.S.C. § 3583(d).

Deportation of criminal aliens is a matter of significant importance to the public. The prosecution of criminals through the assistance of cooperating aliens is also of importance to the public. This Court should reconcile those two competing interests, by granting this petition and resolving the challenge of the Immigration and Naturalization Service to the authority of the various Offices of the United States Attorney during a criminal prosecution.

CONCLUSION

For the above-stated reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

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Opinion Of The Lower Appellate Court.....App. 1

First Trial Court Order On Motion For Summary Judgment .....App. 33

Second Trial Court Order On Motion For Summary Judgment.....App. 45

Alberto SAN PEDRO, Plaintiff-Appellant,

v.

UNITED STATES of America; Kendall Coffey, United States Attorney; United States Department of Justice, Immigration and Naturalization Service, District Director, Robert M. Moschorak; United States Department of Justice, Executive Office for Immigration Review, Director, David L. Milhollan; and United States Department of Justice, Executive Office for Immigration Review, Office of The Immigration Judge, Honorable Bruce W. Solow, and other individuals similarly situated, Defendants-Appellees.

No. 94-4979.

United States Court of Appeals,
Eleventh Circuit.

April 9, 1996.

Arthur Joel Berger, Miami, FL, for appellant.

Kendall Coffey, U.S. Attorney, Dexter A. Lee, Linda Collins, Jeanne M. Mullenhoff, Asst. U.S. Attys., Miami, FL, for appellees.

Appeal from the United States District Court for the Southern District of Florida.

Before COX, Circuit Judge, DYER, Senior Circuit Judge, and GOETTEL*, Senior District Judge.

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* Honorable Gerard L. Goettel, Senior U.S. District Judge for the Southern District of New York, sitting by designation.

DYER, Senior Circuit Judge:

This case arises out of a dispute concerning the scope of a plea agreement between the United States government and Alberto San Pedro ("San Pedro") and representations made by the government during plea negotiations. The district court granted summary judgment for the government holding that the United States Attorney and the Assistant United States Attorneys ("AUSAs") did not have authority to promise, as part of a plea bargain, that San Pedro would not be deported. The Immigration and Naturalization Service ("INS") was thus free to initiate deportation proceedings against San Pedro. We affirm.

I. BACKGROUND

San Pedro is a citizen of Cuba and has been a lawful permanent resident of the United States since May 2, 1956. Following a federal grand jury indictment for bribery of a federal public official and conspiracy to commit bribery, he pled guilty to the conspiracy charge. The government concedes that the plea agreement expressly affords San Pedro transactional immunity. The written plea agreement contains an integration clause and does not mention the subject of deportation, but, according to San Pedro, the United States Attorney and AUSAs who negotiated on behalf of the government represented, as part of the agreement, that the government would not institute deportation proceedings against him. Nevertheless, INS filed an Order to Show Cause why he should not be deported. San Pedro responded by filing the instant Petition for Writ of Mandamus or Prohibition and

Temporary Restraining Order, seeking a declaration that the instigation of deportation proceedings violated the plea agreement because the government had represented that his transactional immunity[1] included a promise of non-deportation.

The government filed a motion to dismiss, which the court converted to a motion for summary judgment. In contesting San Pedro's claim for breach of the plea agreement, the government contended that San Pedro was never promised non-deportation, and even if he was, the promise did not bind the INS because the United States Attorney and AUSAs had no authority to make such promise. The district court found that the United States Attorney's Manual ("USAM") required that the United States Attorney obtain approval from the Department of

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[1] The relevant clause of the plea agreement provides that:

> The United States, in consideration of the defendant's compliance with the terms and conditions of this Plea Agreement, agrees not to prosecute ALBERTO SAN PEDRO for any other offenses based upon any evidence revealed in the investigation that led to the charges in the subject indictment. In addition, the United States agrees not to prosecute ALBERTO SAN PEDRO based upon any other evidence of which it is now aware or which, with the exercise of reasonable diligence, it could presently become aware through communication with state or local enforcement personnel.

San Pedro argued that the agreement "not to prosecute . . . for any other offenses" included a promise not to deport him because, as part of the basis for the bargain, he dropped his appeal of two state court convictions that predicated the show cause order.

Justice before conducting negotiations involving deportation. Because the government had produced no evidence concerning whether the prosecutor sought authorization from the Department of Justice, the court denied the government's first summary judgment motion.

To correct the deficiency, the government filed two more motions for summary judgment, again raising the question of whether the United States Attorney and the AUSAs had the authority to promise San Pedro he would not be deported. The district court determined there was a dispute as to whether the government made the promise but that the decisive legal issue was whether the United States Attorney had the authority to promise not to deport a criminal defendant as a condition of a plea bargain. The court concluded that nothing in the USAM or the Immigration and Nationality Act, 8 U.S.C. § 1101 *et seq.*, ("INA") vested the United States Attorney with that authority. Thus, any promise regarding deportation did not bind the INS and the court entered summary judgment for the government. This appeal ensued.

II. DISCUSSION

We review the district court's grant of summary judgment *de novo*. *Forbus v. Sears Roebuck & Co.*, 30 F.3d 1402, 1404 (11th Cir.1994). A party seeking summary judgment must demonstrate that "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). Summary judgment is appropriate "if a jury, viewing all facts and any reasonable inferences therefrom in the light most

favorable to [the non-moving party], could not reasonably return a verdict in [that party's] favor." *Hale v. Tallapoosa County*, 50 F.3d 1579, 1581 (11th Cir.1995) (citing *Anderson v. Liberty Lobby*, 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986)).

In *Santobello v. New York*, 404 U.S. 257, 92 S.Ct. 495, 30 L.Ed.2d 427 (1971), the Supreme Court stated: "[W]hen a plea rests in any significant degree on a promise or agreement of a prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled." *Id.* at 262, 92 S.Ct. at 499. "When a prosecutor breaks the bargain, he undercuts the basis for the waiver of constitutional rights implicit in the plea." *Id.* at 268, 92 S.Ct. at 502 (Marshall, J. concurring in part and dissenting in part). Furthermore, a guilty plea " 'must stand unless induced by . . . misrepresentation (including unfulfilled or unfulfillable promises). . . . ' " *Mabry v. Johnson*, 467 U.S. 504, 509, 104 S.Ct. 2543, 2547, 81 L.Ed.2d 437 (1984) (quoting *Brady v. United States*, 397 U.S. 742, 90 S.Ct. 1463, 25 L.Ed.2d 747 (1970)).

We are mindful of the due process considerations underlying these principles, and note that San Pedro does not question the voluntary character of his guilty plea. He does not seek to have the plea vacated; rather, he seeks to enforce a promise allegedly made during plea negotiations. "[T]he general rule requiring governmental adherence to promises made during plea negotiations is subject to two conditions. First, the agent making the promise must be authorized to do so, and second, the defendant must detrimentally rely on the promise. If either condition is lacking, then the agreement is unenforceable and the government may withdraw its offer." *United States v.*

Kettering, 861 F.2d 675, 677 (11th Cir.1988) (citing *Johnson v. Lumpkin*, 769 F.2d 630 (9th Cir.1985)). In other words, to enforce a promise made during plea negotiations, there must have been a valid, binding agreement in the first instance upon which the defendant relied in deciding to forego his constitutional rights and plead guilty. For an agreement to be valid and binding, the agent must possess actual authority to make the promise – either express authority or authority implied in or incidental to a grant of express authority. *Thomas v. INS*, 35 F.3d 1332, 1338 (9th Cir.1994). "Estoppel and apparent authority normally will not substitute for actual authority to bind the United States government." *Id.* (citing *Utah Power & Light Co. v. United States*, 243 U.S. 389, 408-09, 37 S.Ct. 387, 391-92, 61 L.Ed. 791 (1917); *Federal Crop Ins. Corp. v. Merrill*, 332 U.S. 380, 384, 68 S.Ct. 1, 2-3, 92 L.Ed. 10 (1947)). *But see Houck ex rel. United States v. Folding Carton Administration Comm.*, 881 F.2d 494, 501 (7th Cir.1989). Therefore, assuming San Pedro was promised non-deportation,[2] the INS is not bound unless the United States Attorney and the AUSAs had either express or implied actual authority to make that representation.

Subsequent to the district court's order, the Ninth Circuit held in *Thomas v. INS* that the INS was bound by a cooperation agreement not to seek deportation of a convicted felon. 35 F.3d at 1335. In *Thomas* the defendant and

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[2] The parties dispute whether such promise was made, however, the factual dispute is irrelevant in view of our holding that the United States Attorney and the AUSAs lacked authority to bind the INS. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986).

an AUSA entered into a letter agreement where the defendant was to provide the government with information about narcotics trafficking and work as a cooperating witness for two years. In return, the government agreed not to oppose Thomas' motions for reduction of sentence or relief from deportation. Nonetheless, after his conviction, the INS initiated deportation proceedings. *Id.* at 1335-36. The court reasoned that, despite the AUSA's lack of express authority to bind the INS to the agreement, Congress, through its grant of power "to prosecute for all offenses against the United States," 28 U.S.C. § 547(1) (1988), had given the United States Attorney implied actual authority to bind the "government," and thus the INS, not to oppose motions for relief from deportation. *Id.* at 1339-41. The court found that a United States attorney's authority to obligate the government "as part of a plea bargain is incidental to his statutory authority to prosecute crimes." *Id.* at 1340. According to the *Thomas* court, the United States attorneys need not receive authority from the attorney general to bind the INS to their agreements with defendants because they have already received such authority from Congress. *Id.* at 1338-40. Absent any express limitation on that authority by the attorney general, therefore, United States attorneys are free to bind the INS (and presumably other government agencies) to agreements with defendants so long as the agreements fall within the scope of the broad language of § 547(1). *Id.* at 1338-41.

In *Margalli-Olvera v. INS*, 43 F.3d 345 (8th Cir.1994), the Eighth Circuit adopted the reasoning of *Thomas*. There the AUSA agreed that the government would recommend against deportation if the defendant participated in a

debriefing; otherwise, the government would remain silent regarding deportation. *Id.* at 348. In upholding the authority of the AUSA to bind the INS to the plea agreement, the court apparently extended the holding of *Thomas* to say that a United States attorney has authority to bind all governmental agencies to plea agreements. *See id.* at 353 ("[A]n Assistant United States Attorney enters into a plea agreement on behalf of the United States government as a whole. Accordingly, promises made by an Assistant United States Attorney bind all agents of the United States government. Therefore, we hold that unless a plea agreement uses specific language that limits the agents bound by the promise, ambiguities regarding the agencies bound by the agreement are to be interpreted to bind the agency at issue."). If this is a correct reading of Margalli, we reject the suggestion that a government attorney has authority to bind all government agencies to plea agreements by virtue of § 547(1).

We agree that Congress did not expressly grant the United States attorney authority to bind the INS, or any other governmental agency. *See* 28 U.S.C. § 547 and *Thomas*, 35 F.3d at 1338-39. Our agreement with the Ninth Circuit, however, ends there. We believe *Thomas* incorrectly harmonized the statutes that empower the United States attorneys and the attorney general,[3] and failed to

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[3] *Cf.* 28 U.S.C. § 547(1) (granting United States attorneys the power to prosecute) with 28 U.S.C. § 515(a) (authorizing the attorney general to conduct "any kind of legal proceeding" which United States attorneys are authorized by law to conduct) and *see* 35 F.3d at 1338-39 (attorney general and United States attorney have overlapping authority expressly granted by Congress).

consider that the express authority to enforce immigration law is concentrated solely in the attorney general. It is unclear to this court, as it was to the district court, why Congress would have granted United States attorneys the authority to enter into agreements with criminal defendants that bind the INS while simultaneously granting the authority to enforce the specific provisions of the immigration laws to the attorney general in the INA. We therefore follow the principle, upheld by the Supreme Court on numerous occasions, that a specific statute takes precedence over a more general one. *See, e.g., Simpson v. United States*, 435 U.S. 6, 15, 98 S.Ct. 909, 914, 55 L.Ed.2d 70 (1978); *Brown v. General Services Administration*, 425 U.S. 820, 834, 96 S.Ct. 1961, 1968-69, 48 L.Ed.2d 402 (1976).

Congress placed the responsibility of enforcing the INA in the hands of the attorney general, who in turn is permitted to delegate her powers to the commissioner of the INS. 8 U.S.C. § 1103(a) and (b); 8 C.F.R. § 2.1 (1995); *INS v. Phinpathya*, 464 U.S. 183, 185 n. 1, 104 S.Ct. 584, 587 n. 1, 78 L.Ed.2d 401 (1984). The attorney general's authority includes the power to deport certain classes of aliens pursuant to 8 U.S.C. § 1251(a). Only officers and employees of INS may initiate deportation proceedings by filing an Order to Show Cause with the Office of the Immigration Judge, 8 C.F.R. § 242.1(a) (1995), and only officers authorized in § 242.1(a) may cancel an Order to Show Cause. 8 C.F.R. § 242.7 (1995). Being neither an INS officer nor employee, a United States attorney cannot initiate or terminate deportation proceedings. It follows, therefore, that a United States attorney and AUSAs cannot preclude a deportation proceeding by promising an

alien defendant that he will not be deported because such action would constitute an impermissible exercise of authority over the INS. To hold otherwise is to say that the United States attorney's general power of prosecution can usurp the attorney general's specific power to deport certain classes of aliens, which we do not believe Congress intended. Thus, reading 28 U.S.C. § 547(1), 28 U.S.C. § 515(a) and 8 U.S.C. § 1103(a) together, we hold that the power to promise a criminal defendant during plea negotiations that he will not be deported is vested in the attorney general.

For the United States attorney to promise a criminal defendant non-deportation, therefore, the attorney general must have delegated the power to him. The parties dispute whether such a delegation has been made, but they agree the only possible sources of delegation are §§ 9-16.020[4] and 9-73.510[5] of the USAM. We

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[4] USAM § 9-16.020 provides that:

> U.S. Attorneys should also be cognizant of the sensitive areas where plea agreements involve either extradition or deportation. No U.S. Attorney or AUSA has the authority to negotiate regarding an extradition or deportation order in connection with any case. If extradition has been requested or there is reason to believe that such a request will be made, or if a deportation action is pending or completed, U.S. Attorneys or AUSAs, before entering negotiations regarding such matters, must seek specific approval from the Assistant Attorney General, Criminal Division.

[5] USAM § 9-73.510 provides that:

> In a criminal case, the United States Attorney should not as part of a plea agreement or an agreement to

cannot improve upon the district court's reasoning on this issue:

> Upon review, the Court finds that [9-16.020 and 9-73.510], whether read independently or together, do not constitute a delegation of authority to U.S. Attorneys and AUSAs from the Attorney General. There are several reasons for this. For instance, although the government argues to the contrary, the Court is not convinced that, as currently drafted, the USAM could constitute the source of such a delegation. It is well established that the USAM only provides guidance to officials at the Department of Justice and does not have the force of law. *U.S. v. Carson*, 969 F.2d 1480, 1495 n. 8 (3d Cir.1992) ("Though the Manual is not binding on United States Attorneys, it is designed to serve as a guide to their conduct. . . . "); *United States v. North*, 1988 WL 148491, 1988 U.S. Dist. Lexis 16017 (D.D.C.1988) ("The [USAM] is not published in the United States Code or Code of Federal Regulations and none of its provisions are promulgated through the Federal Register. It does not have the force of law."); *United States v. Huslage*, 480 F.Supp. 870, 873 (W.D.Pa.1979) ("The procedures set forth in the [USAM] are not binding on the district offices. . . . "). The USAM itself states that:
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> > The Manual provides only internal Department of Justice guidance. *It is not intended to, and may not be relied upon to create any rights, substantive or procedural, enforceable at*

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testify, or for any other reason, promise an alien that he/she will not be deported, without prior authorization from the Criminal Division.

> *law by any party in any matter civil or criminal.* Nor are any limitations hereby placed on otherwise lawful litigative prerogatives of the Department of Justice.

USAM § 1-1.000 (emphasis added). San Pedro relies on the USAM as the source of a U.S. Attorney/AUSA's authority to promise non-deportation and, thus, as the ultimate source of his right against deportation. The underlined language makes clear that the USAM cannot serve as the source of such a right, however. Put another way, the language of section 1-1.000 establishes that the Attorney General did not intend the USAM to serve as the vehicle for the delegation of authority to U.S. Attorneys and AUSAs.

Even if the USAM could serve as the source of a delegation of the Attorney General's authority to promise non-deportation, the language in sections 9-16.020 and 9-73.510 is insufficient to effect such a delegation. In order to be effective, a delegation of statutory authority from the Attorney General to other federal officials must be both *explicit* and *affirmative.* [*See United States v. Pees,* 645 F.Supp. 697, 704 (D.Colo.1986) ("If the attorney general were not required to execute an affirmative act in subdelegating his authority, the authority of other administrative agencies *vis. a vis.* the authority of the attorney general would be hopelessly ambiguous and unworkable.")]; *see also, United States v. Touby,* 909 F.2d 759, 770 (3d Cir.1990) ([the Attorney General must explicitly subdelegate authority for the subdelegatee to be empowered to act], *aff'd,* 500 U.S. 160, 111 S.Ct. 1752, 114 L.Ed.2d 219 (1991).

The need for express delegations in the area of immigration and naturalization is particularly acute. The area

is one in which the Attorney General has already delegated significant authority to another administrative agency – the INS. As a result, the Attorney General must take special care to make delegations of authority in this area to officials outside INS with particular clarity. Otherwise, confusion, and often litigation, concerning the scope of the authority of the INS and that of the other delegatee will likely result.

Confusion of this kind is at the heart of this case. As noted, the Attorney General has delegated [authority] to the INS includ[ing] the authority to initiate and prosecute deportation proceedings. *See* 8 C.F.R. § 2.1 [1995]. Absent a clear, explicit delegation of authority to U.S. Attorneys and AUSAs of the authority to promise non-deportation to criminal defendants, officials at the INS may initiate deportation proceedings against a particular defendant without considering whether an AUSA or U.S. Attorney has promised the defendant non-deportation as part of a plea agreement. Protracted litigation arising out of the ambiguity concerning the authority of the U.S. Attorneys and AUSAs is the likely result. That is precisely what occurred here.

Neither section 9-73.510 no[r] section 9-16.020 contain an explicit, affirmative delegation to U.S. Attorneys and AUSAs of the Attorney General's authority to promise non-deportation. To the contrary, both sections expressly *limit* the authority of U.S. Attorneys and AUSAs to make such promises. Section 9-73.510 is particularly clear. The section unequivocally provides that, unless a U.S. Attorney obtains prior authorization from the Criminal Division of the Department of Justice, the U.S. Attorney should not *promise* an alien as part of a plea

agreement that he or she will not be deported. Section 9-16.020 goes even farther. The section provides that, if a deportation action against a criminal defendant is pending or completed, a U.S. Attorney or AUSA cannot even *negotiate* regarding deportation without obtaining *specific approval* from the Assistant Attorney General of the Criminal Division of the Department of Justice. Nothing in these sections remotely suggests that a U.S. Attorney or AUSA has the authority to negotiate, or to promise anything, concerning deportation absent such approval.[6]

III. CONCLUSION

Based on the foregoing, we conclude the United States Attorney and the AUSAs who negotiated the plea agreement with San Pedro did not have the authority to promise that he would not be deported for that authority was vested in the attorney general. We further conclude

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[6] The dissent posits that the issue of whether the attorney general expressly delegated authority to the U.S. Attorney in this case is necessarily subsumed in the factual dispute of whether a promise was ever made to San Pedro, and thus summary judgment was precluded. This point is irrelevant for three reasons. First, we assume for summary judgment purposes that the promise was made. Second, the district court specifically found that the government produced unrebutted evidence that the prosecutors who negotiated the plea bargain never obtained such authorization. Moreover, San Pedro conceded in his initial brief that the U.S. Attorney and AUSAs never contacted anyone in the Department of Justice for actual authorization to promise nondeportation. Because San Pedro did not contend in the district court or on appeal that the attorney general authorized the promise, there is no factual dispute precluding summary judgment.

that §§ 9-16.020 and 9-73.510 of the USAM do not constitute a delegation of that authority to the United States Attorney and AUSAs. Summary judgment for the government is therefore AFFIRMED.

GOETTEL, Senior District Judge, dissenting:

I respectfully dissent. The principal issue in this case is not the authority of the United States Attorney's Office with respect to deportation. Rather, the critical issue is whether there has been a violation of San Pedro's fundamental right to due process if, in fact, the government reneged on a prosecutorial promise made as part of San Pedro's plea agreement. *See Bemis v. United States*, 30 F.3d 220, 222 (1st Cir.1994) ("[T]he crucial question is not whether the Government had the authority to carry out the promise which [petitioner] claims he understood it to make, but whether it did in fact make such a promise," citing *United States v. Cook*, 668 F.2d 317, 320 (7th Cir.1982)[1]).

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[1] In *United States v. Cook*, 668 F.2d 317 (7th Cir.1982), the issue before the court was whether a defendant should be allowed to plead anew to charges against him where the government had breached a plea agreement. The government had agreed to offer nothing in aggravation of the defendant's sentence. Nevertheless, the probation officer who prepared the presentence report used damaging background information from the government's files. The government claimed that it was without authority to withhold relevant information from the sentencing court and argued that, therefore, no breach could have occurred. The Seventh Circuit held that although there was substantial doubt as to whether the government could lawfully withhold relevant information, that issue was not dispositive. "Regardless of whether the Government has the authority to withhold relevant information, if it did in fact promise to do so,

This appeal arises from the district court's grant of summary judgment in favor of the government, in an action brought by San Pedro to force the government to abide by promises relating to his non-deportation that it allegedly made as part of a plea agreement.[2] Exactly what those promises are we do not know. However, in ruling on a motion for summary judgment, the court must resolve all ambiguities and draw all justifiable inferences in favor of the non-moving party, San Pedro. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 106 S.Ct. 2505, 2513-14, 91 L.Ed.2d 202 (1986). And if, in fact, such promises were made, as San Pedro claims, due process requires the government to adhere to the promises that it made as part of the plea agreement. *United States v. Harvey*, 869 F.2d 1439, 1443 (11th Cir.1989); *United States v. Weiss*, 599 F.2d 730, 737 (5th Cir.1979).

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then [the defendant] is nevertheless entitled to relief." *Id.* at 320 (citations omitted).

[2] In his Complaint, San Pedro alleges as follows:

> 14. Plaintiff would not have entered a Plea Agreement requiring him to withdraw his appeals from state convictions but for the representation of the United States of America that his transactional immunity precluded the institutions [sic] of deportation proceedings against him for those convictions and that if not covered by the transactional immunity the United States of America would do everything possible to preclude the institution of deportation proceedings.

In its Answer, the government responds: "Defendants are without sufficient knowledge to either admit or deny the allegations in paragraph fourteen. Consequently, the allegations are denied."

These due process concerns the majority has ignored. They have held in essence that, whatever the promises, the United States Attorney's Office did not have the authority to make such promises and, therefore, these promises need not be enforced.[3] I cannot agree.

San Pedro is a citizen of Cuba and has been a lawful permanent resident of the United States since 1956. On October 7, 1988, a federal grand jury in the Southern District of Florida returned a three-count indictment against San Pedro, charging him with two counts of bribery and one count of conspiracy to commit bribery. At that time, the United States Attorneys' Office for the Southern District of Florida was involved in an extensive investigation of corruption of various elected officials in the City of Hialeah, Florida. Because of San Pedro's involvement with "the players in Hialeah politics," the government sought to use San Pedro as a government witness. *United States v. San Pedro*, 781 F.Supp. 761, 765

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[3] The majority relies on the case of *United States v. Kettering*, 861 F.2d 675 (11th Cir.1988), in support of its holding. Kettering is distinguishable. In that case, the defendant sought to enforce a *proposed* plea agreement discussed between defense counsel and a DEA agent. The agreement was never approved by the Assistant United States Attorney in charge of the case, who so informed defense counsel. Defense counsel then filed a motion to enforce the proposed agreement prior to the defendant's entering a plea, which motion was heard at the time of the arraignment. The court denied the motion and allowed the defendant to withdraw his guilty plea entered at the arraignment. In the instant case, the promises were allegedly made directly by the United States Attorney's Office and were allegedly relied upon by San Pedro in entering his guilty plea, withdrawing two pending state court appeals, and in cooperating with the government for over one year.

(S.D.Fla.1991). Thus, San Pedro was able to negotiate a plea agreement with the United States Attorney's Office under which he pled guilty to the conspiracy count, and the government dismissed the remaining counts against him. In return, San Pedro agreed to provide the government with information concerning all criminal activities within the United States of which he was aware. He also agreed to voluntarily dismiss two pending state court appeals from criminal convictions for conspiring to traffic in cocaine and unlawful compensation.

Under the express terms of the written Plea Agreement with San Pedro, the United States agreed not to prosecute San Pedro for any other offenses based upon any evidence revealed in the investigation that led to the indictment, and upon any evidence of which it was then aware or could be aware in the exercise of due diligence. The government concedes that the plea agreement provided San Pedro with transactional immunity. *San Pedro v. United States,* No. 93-0039-CIV-NESBITT, Order at 2 (S.D.Fla. Aug. 23, 1993). Moreover, according to San Pedro, the Assistant United States Attorneys negotiating on behalf of the government represented to him that, as part of the agreement, the government would not institute deportation proceedings against him. The government denies that such a promise was made.

At the sentencing hearing, which had been continued to allow San Pedro to cooperate with the government, the government recommended that San Pedro be released immediately and placed on probation for four to six months to facilitate his continued cooperation. The government further recommended that, irrespective of the sentence imposed, he be immediately eligible for parole

pursuant to 18 U.S.C. § 4205(b)(2). The district judge adopted the government's recommendation of immediate parole eligibility but still sentenced San Pedro to thirty (30) months in prison. He was credited with all of the time that he served in federal custody as a result of these charges. San Pedro was ultimately paroled on December 20, 1989. *San Pedro,* 781 F.Supp. at 765. The government described San Pedro's contribution to the government's investigation of the corruption in Hialeah politics as substantial, truthful, and invaluable. *Id.* at 765-66.

On December 22, 1989, two days after San Pedro's parole, the Immigration and Naturalization Service (the INS) issued an Order to Show Cause, charging San Pedro with being deportable from the United States due to the commission of various crimes. On or about November 10, 1992, the INS filed the Order to Show Cause with the Office of the Immigration Judge in Miami, Florida.[4] On January 11, 1993, San Pedro filed a petition for writ of mandamus or prohibition and temporary restraining order, asking the district court to declare the deportation proceedings unlawful and to enjoin the deportation proceedings from going forward based on the prosecutorial

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[4] From the Sworn Statement of San Pedro's immigration attorney, Teofilo Chapa, Esq., dated April 6, 1993, which was filed in this case, it appears that this three-year delay between the issuance of the Order to Show Cause and the filing of the Order with the Office of the Immigration Judge in Miami was due at least in part to San Pedro's cooperation in the investigation and trial of Raul Martinez, the Mayor of Hialeah, as well as ongoing communications between Attorney Chapa and the INS. *See United States v. San Pedro,* 781 F.Supp. at 765.

promises allegedly made to him as part of his plea agreement.

The district court never resolved the issue of what promises, if any, were made to San Pedro regarding non-deportation. Indeed, in denying the government's first motion for summary judgment, the district court, applying the principles set forth in *United States v. Rewis*, 969 F.2d 985, 988 (11th Cir.1992),[5] held this issue was "clearly one of fact and must be resolved by the trier of fact." San Pedro Order of Aug. 23, 1993 at 5. The district court found as follows:

> The Court finds the terms "prosecute . . . for any other offenses" to be ambiguous. Deportation involves the imposition of a specific sanction – expulsion from the country. Moreover, in the present case, there is a close link between the

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[5] In *United States v. Rewis*, 969 F.2d 985, 988 (11th Cir.1992), this court held that whether the government violated the plea agreement is to be judged according to the defendant's reasonable understanding at the time he entered the plea. If the defendant's understanding is disputed by the government, then it is the function of the court to determine the terms of the plea agreement according to an objective standard. This court cautioned against a "hyper-technical reading of the written agreement" and "a rigidly literal approach in the construction of the language." *Id.* (citations omitted). Rewis further instructs that the written agreement should be viewed against the background of the negotiations and should not be read to directly contradict an oral understanding. *Id.* (citations omitted). Finally, Rewis holds that an ambiguous plea agreement must be read against the government and that this method of interpretation must be strictly adhered to because a plea agreement constitutes a waiver of significant constitutional rights. *Id.*

> sanction and San Pedro's history. As part of the Plea Agreement, San Pedro agreed to withdraw his appeals of two state convictions. These convictions form the basis upon which the government seeks to deport him. San Pedro might have thus reasonably regarded deportation as an additional sanction for the offenses for which he was convicted in state court and might therefore reasonably have construed the terms "prosecute . . . for any other offenses" to cover the initiation of deportation proceedings.
>
> Even if this were not the case, the Court would not enter summary judgment in favor of the government without receiving evidence concerning the government's alleged representations to San Pedro. As noted, the Court is obligated to interpret the Plea Agreement in the light of the negotiations preceding the execution of the Agreement. If agents of the government did promise San Pedro that he would not be deported, then it might well have been reasonable for him to believe that the phrase "prosecute . . . for any other offenses" covered deportation proceedings. The representations made by the government prior to the execution of the Plea Agreement are thus not only not irrelevant, they may have a pivotal bearing on what San Pedro might reasonably have interpreted that agreement to mean.

Id. at 7-8.

I believe the district court was correct in this regard. Although this is not the order being appealed, even after two additional summary judgment motions were filed and decided, this critical and pivotal issue was never

resolved. The district court, as the majority here, ultimately held that the United States Attorney's Office did not have the authority to promise non-deportation and, thus, never reached the issue of what promises, if any, regarding non-deportation were made by the government. *San Pedro v. United States*, No. 93-0039-CIV-NESBITT (S.D.Fla. Aug. 18, 1994). For purposes of this appeal, we must assume that such a promise was made. Even if we conclude that the United States Attorney's Office lacked the authority to make the promise, there still is a violation of San Pedro's constitutional right to due process in the breaching of a prosecutorial promise that was part of a plea agreement. Thus, rather than focusing on the authority issue as the district court and the majority have done, we must look instead to the fundamental due process issue.

As this Court held in *In re Arnett*, 804 F.2d 1200, 1202-03 (11th Cir.1986), it is incumbent upon this Court to determine whether the government's actions are inconsistent with what the defendant [San Pedro] reasonably understood when he entered his guilty plea. A guilty plea is more than an admission of past conduct; it is a waiver of the right to a trial by jury, and in this case, a waiver of the right to appeal. To constitute a valid waiver of substantial constitutional rights, a guilty plea must represent a voluntary, knowing, intelligent act and must be offered with sufficient awareness of likely consequences. *Id.* "A plea bargain standing alone is without constitutional significance; in itself it is a mere executory agreement which until embodied in the judgment of a court, does not deprive an accused of liberty or any other constitutionally protected interest. It is the ensuing guilty plea

that implicates the Constitution." *Mabry v. Johnson*, 467 U.S. 504, 507-8, 104 S.Ct. 2543, 2546, 81 L.Ed.2d 437 (1984) (footnote omitted). Given such implications, this Circuit, as have others, has required the government to adhere strictly to the terms of a plea agreement. *In re Arnett*, 804 F.2d at 1202-03; *see also Correale v. United States*, 479 F.2d 944, 947 (1st Cir.1973). Thus, unlike situations involving the normal commercial contract, when a plea is made based upon prosecutorial promises, due process requires that the government adhere to the terms of any plea agreement that it makes. *United States v. Pelletier*, 898 F.2d 297, 302 (2d Cir.1990) (citing *Mabry v. Johnson*, 467 U.S. at 509, 104 S.Ct. at 2547).

The starting point for analyzing issues involving the breach of a plea agreement by the government is the Supreme Court's decision in *Santobello v. New York*, 404 U.S. 257, 92 S.Ct. 495, 30 L.Ed.2d 427 (1971). *See In re Arnett*, 804 F.2d at 1202. In *Santobello* the Supreme Court held that, as part of the criminal justice process, accepting a plea of guilty "must be attended by safeguards to insure the defendant what is reasonably due in the circumstances. The circumstances will vary, but a constant factor is that when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled." 404 U.S. at 262, 92 S.Ct. at 499. In that case, finding that the prosecution, through inadvertence, had not lived up to its plea bargain, the Supreme Court vacated the judgment and remanded to the state court to determine whether the criminal defendant should be re-sentenced with the prosecutor keeping his bargain, or whether the defendant should be allowed

to withdraw his guilty plea. As the majority opinion notes, it matters not whether the promise is unfulfillable, *Mabry v. Johnson*, 467 U.S. at 509, 104 S.Ct. at 2547 (quoting *Brady v. United States*, 397 U.S. 742, 90 S.Ct. 1463, 25 L.Ed.2d 747 (1970)); there is nevertheless a guilty plea induced by a misrepresentation.

This is not the first time San Pedro has been confronted with the government's breach of its plea agreement. *See San Pedro*, 781 F.Supp. 761. In 1991, San Pedro was indicted for RICO violations. He moved to dismiss the indictment on the ground that it violated his plea agreement with the government, the same plea agreement that is the subject of this appeal. The district court, in granting San Pedro's motion, found that the government had breached its duty of good faith and fair dealing and that it had failed to live up to its obligation of not prosecuting San Pedro. *Id.* at 773-75. In a strongly worded opinion, the court concluded:

> The Court believes that the government "set up" San Pedro in an effort to renege on its promise of immunity, after it had derived substantial and invaluable cooperation from him over a fourteen month period.
>
> Having received its benefit from the bargain, namely, San Pedro's cooperation, the government sought to deny the defendant [San Pedro] the benefit for which he had bargained – immunity from prosecution.
>
> Such conduct on the part of the government is simply unfair and this Court of the United States will not permit it.

> In a day when the confidence and trust of the American people in their government ebbs, it is critical that the United States government keep its word and live up to its obligations. If doing so means that it must forego convicting one person of a crime, that is a small price to pay to preserve the integrity of our institutions.
>
> The foundation of the Republic will not crack if the United States fails to put Alberto San Pedro in a federal prison. It will shatter, however, if the American People come to believe that their government is not to be trusted. A deal is a deal, and the government's word must be its bond.

Id. at 776.

The principle that "[a] deal is a deal, and the government's word must be its bond," *id.*, must guide us in this appeal. To paraphrase the Fourth Circuit's decision in *United States v. Carter,* 454 F.2d 426 (4th Cir.1972) (en banc), *cert. denied,* 417 U.S. 933, 94 S.Ct. 2646, 41 L.Ed.2d 237 (1974), there is more at stake than just whether San Pedro should be deported. "At stake is the honor of the government, public confidence in the fair administration of justice, and the efficient administration of justice in a federal scheme of government." *Id.* at 428.

From the earlier *San Pedro* decision, we also know that, in a letter dated October 3, 1989, an Assistant United States Attorney urged the Assistant District Director of the INS to withhold or suspend deportation proceedings against San Pedro because of his cooperation. *San Pedro,* 781 F.Supp. at 765-66. Additionally, in the instant case, San Pedro's immigration attorney submitted a sworn statement detailing other efforts undertaken by the

United States Attorney's Office to have the deportation proceedings terminated by the INS.[6] In light of the action taken by the United States Attorney's Office, it would appear that something regarding non-deportation was promised to San Pedro, and that, at least for some period of time, the INS honored the request of the United States Attorney's Office in that regard.

There is also binding legal precedent in this Circuit concerning a prosecutor's breach of a plea agreement involving deportation and/or extradition, which precedent cannot be ignored.[7] *See Geisser v. United States*, 513 F.2d 862 (5th Cir.1975), *after remand*, 554 F.2d 698 (5th Cir.1977), *after remand*, 627 F.2d 745 (5th Cir.1980), *cert. denied sub nom. Bauer v. United States*, 450 U.S. 1031, 101 S.Ct. 1741, 68 L.Ed.2d 226 (1981). In that case, the Department of Justice Organized Crime Section entered into a plea bargain with two criminal defendants under which

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[6] Attorney Teofilo Chapa, in his Sworn Statement dated April 6, 1993, testified that Assistant United States Attorney Steven Cheykin wrote the District Director of the INS on June 5, 1990, asking the INS to consider San Pedro's cooperation and to terminate the deportation proceeding. (Sworn Statement of Teofilo Chapa, Esq., at 13-15). His letter ends with a statement that "[y]ou can be assured that in the future your office will be consulted regarding any proposed plea or cooperation agreement the terms of which may affect matters within the jurisdiction of the Immigration and Naturalization Service." *Id.* at 14-15. This statement could well be read to imply that in this instance the United States Attorney's Office made promises to San Pedro regarding deportation without consulting the INS.

[7] Decisions of the Fifth Circuit decided prior to the close of business on September 30, 1981, are binding precedent in the Eleventh Circuit under *Bonner v. City of Pritchard*, 661 F.2d 1206, 1209 (11th Cir.1981).

they would reveal everything that they knew regarding a drug smuggling conspiracy and would testify at the trials of the other conspirators. In turn, the government promised that they would be reindicted on lesser offenses carrying maximum sentences of seven years, that they would be paroled in three years, and that the government would use its "best efforts" to avoid their deportation[8] to France or Switzerland. When it appeared that the Department of Justice was no longer going to live up to its plea bargain as to extradition, a petition for habeas corpus and injunctive relief was filed. The Fifth Circuit found that the federal government had an obligation to carry out the plea bargain made. Although there was considerable controversy as to what the prosecutors in Geisser had promised, ultimately it was determined that the plea bargain only obligated prosecutors to use their "best efforts" to avoid the return of the petitioner to Switzerland,[9] and the

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[8] Although the plea bargain stated "deportation", the issue was extradition which is subject to specific international obligations, while deportation is essentially at the option of the deporting country.

[9] The district court found in the first instance that there was a specific, definite agreement that the petitioner would be deported to some country other than Switzerland or France. After setting aside and enjoining the execution of the extradition order, the district judge directed that, if it was determined that the petitioner should be deported, it would be only to an "acceptable" country – not France, Switzerland, or the possessions of either. *Geisser*, 513 F.2d at 868. On appeal, the Department of Justice insisted that the deportation-extradition commitment was not the absolute one found by the district court but the more limited commitment to use its "best efforts." *Id.*; *Geisser*, 554 F.2d at 699. The Fifth Circuit, through Judge Brown, asked the government for an "authoritative declaration

government was ordered by the court to live up to its end of the bargain.

The case was remanded for the district court to determine what had been done with respect to the Justice Department's promise to use best efforts. Numerous letters were sent from the Department of State to the Swiss government and Swiss embassy. Finally, after two more appeals, the Fifth Circuit determined that the government had lived up to its agreement to use best efforts and that this agreement could not override a century-old treaty between the United States and Switzerland requiring extradition of the defendant.[10] As the late Chief Judge Brown wrote in *Geisser*, 513 F.2d at 863, "[t]his is an extraordinary case calling for extraordinary action. It is a case of the great United States going back on its word in a plea bargain made by the Department of Justice which assured the Government vital indispensable evidence leading to conviction of principals in a grand scale international heroin importing conspiracy. The effect of part of the bargain was that the defendant-turned-states-evidence would not be deported. . . . " *See also Martin v.*

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of the position of the United States Government – not just that of one or more departments or agencies;" *Geisser*, 513 F.2d at 869; and remanded for further hearings on the question of "just what has been done with the promise 'to use our best efforts.' " *Id.* at 872.

[10] It is significant that in *Geisser* different departments within the government were involved (the Department of State and the Department of Justice), yet the Fifth Circuit still required the two departments to live up to the agreement made by the Department of Justice, whereas the instant case involves different arms of the same department.

Warden, Atlanta Pen, 993 F.2d 824, 829 n. 9 (11th Cir.1993) (recognizing that a defendant has a valid constitutional claim if the government has not complied with its obligations under plea agreements even though such may conflict with the United States' obligation to a treaty partner). San Pedro's allegations, if true, are no less serious and demand that this court ensure that his constitutional rights have not been violated.

If it is ultimately determined that a prosecutorial promise of non-deportation was made, then San Pedro is entitled to relief. *United States v. Yesil,* 991 F.2d 1527, 1532 (11th Cir.1992). Defaulted plea bargains must be remedied. *Geisser,* 513 F.2d at 871. So long as a prosecutorial promise remains unfulfilled, the plea on which it was based is involuntary and, therefore, unconstitutional unless the breach is remedied. *Geisser,* 554 F.2d at 705. Relief may be in the form of specific performance of the plea agreement or in the opportunity to withdraw the guilty plea. *Id., citing Santobello,* 404 U.S. at 263, 92 S.Ct. at 499. *See also Geisser,* 513 F.2d at 871; and *Geisser,* 554 F.2d at 704-705.

The majority notes that San Pedro does not seek one of the two remedies available under *Santobello,* namely, the withdrawal of his guilty plea. To allow San Pedro to withdraw his guilty plea is no remedy at all, for he has already served his sentence; he has given the government invaluable cooperation over a fourteen month period; and he has withdrawn his appeals of the two state court convictions. Although fashioning an appropriate remedy is left to the sound discretion of the trial court, *Santobello,* 404 U.S. at 263, 92 S.Ct. at 499, it appears that the only remedy remaining, if in fact such a promise was made, is

to enforce it. *Geisser*, 513 F.2d at 871. But, again, we must first know exactly what that promise was.

Clearly the United States Attorney's Office did not have the express authority to promise a criminal defendant that he would not be deported as part of a plea bargain. However, it is not necessary to go as far as the Ninth Circuit did in *Thomas v. INS*, 35 F.3d 1332 (9th Cir.1994), and hold that the authority to prosecute all offenses against the United States found in 28 U.S.C. § 547(1) (1988) gives the United States Attorney the implied actual authority to bind the government including the Immigration and Naturalization Service. *Id.* at 1339-41. Nor is it necessary to go as far as the Eighth Circuit did in *Margalli-Olvera v. INS*, 43 F.3d 345 (8th Cir.1994), in holding that the United States Attorney has authority to bind all governmental agencies to plea agreements.

I agree with the majority that the power to promise a criminal defendant in a plea bargain that he will not be deported is vested in the Attorney General.[11] I also agree

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[11] The Immigration and Naturalization Act, 8 U.S.C. § 1103, contains one of the broadest delegations of authority by Congress. *Jean v. Nelson*, 711 F.2d 1455 (11th Cir.1983), *aff'd*, 472 U.S. 846, 105 S.Ct. 2992, 86 L.Ed.2d 664 (1985). It allows the Attorney General to delegate his responsibilities under the Act to "any employee of the Service or the Department of Justice" and to "confer or impose upon any employee of the United States, . . . any of the powers, privileges, or duties conferred or imposed by this chapter or regulations issued thereunder upon officers or employees of the Service."

with the lower court that unless the United States Attorney obtains prior authorization from the Criminal Division of the Justice Department, the United States Attorney should not promise an alien as part of a plea agreement that he will not be deported. The majority then notes that there is no evidence that the United States Attorney or the Criminal Division ever authorized such a promise. That is part of the factual question of whether they ever made such a promise, which in my opinion precludes our affirming the grant of summary judgment in favor of the government. Since the government denies having made the promise, it follows that they would not have sought approval. However, the plaintiff would not know this. San Pedro claims that he was made a promise and there is no way that he would know whether or not the proper authorization had been obtained. Clearly the Attorney General, as head of the Department of Justice which includes both the Office of United States Attorneys and the Immigration and Naturalization Service, could have authorized the United States Attorney's Office to make such a promise.[12]

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[12] Congress has granted broad prosecutorial powers to United States Attorneys, 28 U.S.C. § 547. This express grant of authority also carries with it the implied authority to negotiate plea bargains with respect to subsequent deportation proceedings. Deportation commonly arises as a result of a criminal prosecution, and the terms of a plea or cooperation agreement will commonly affect deportation. Since both the United States Attorneys and the INS are part of the same department of the government, if the Department of Justice wishes to have internal coordinating procedures for agreements by United States Attorneys and defendants which affect INS, that is more of an administrative concern of the Attorney

This case is on appeal from a grant of summary judgment in favor of the government. There has been no factual determination as to what promises concerning deportation, if any, were made by the United States Attorney's Office to induce the plea bargain. Under the circumstances I would reverse and remand for further factual findings.

General. As the Fourth Circuit noted in *United States v. Carter*, 454 F.2d 426 (4th Cir.1972), a case involving the breach of a prosecutorial promise involving multiple federal districts,

> If there be a fear that an United States Attorney may unreasonably bargain away the government's right and duty to prosecute, the solution lies in the administrative controls which the Attorney General of the United States may promulgate to regulate and control the conduct of cases by the United States Attorneys and their assistants. The solution does not lie in formalisms about the express, implied or apparent authority of one United States Attorney, or his representative, to bind another United States Attorney and thus to visit a sixteen year sentence on a defendant in violation of a bargain he fully performed.

Id. at 428.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 93-0039-CIV-NESBITT

ALBERTO SAN PEDRO,

Plaintiff,

vs. ORDER

UNITED STATES OF AMERICA, et al.,

Defendants.

_____/

This cause comes before the Court upon Defendants' Motion to Dismiss. By Order of June 18, 1993, the Court converted the motion into a motion for summary judgment and directed the parties to submit any affidavits and other evidence pertinent to the motion. The parties have now done so and the motion is ripe for disposition.

BACKGROUND

This case arises out of a dispute concerning the scope of a plea agreement ("the Plea Agreement") between the United States government and Plaintiff Alberto San Pedro ("San Pedro") and concerning the representations made during the negotiations that preceded the execution of the agreement. San Pedro is a citizen of Cuba and has been a lawful permanent resident of the United States since May 2, 1956. On October 7, 1988, a federal grand jury returned a three count indictment against San Pedro in *United States v. Alberto San Pedro*, Case No. 88-0677-Cr-Aronovitz. The indictment included two counts for bribery and one count for conspiracy to commit bribery.

In July 1989, San Pedro entered the Plea Agreement, in which he pled guilty to the conspiracy count. Under the express terms of the agreement, the United States agreed not to prosecute San Pedro for any other offenses based upon any evidence revealed in the investigation that led to the indictment, and on any evidence of which it was then aware or could be aware in the exercise of due diligence. The government concedes that the Plea Agreement provided San Pedro with transactional immunity. Moreover, according to San Pedro, the Assistant United States Attorneys ("AUSAs") negotiating on behalf of the government represented to him that, as part of the agreement, the government would not institute deportation proceedings against him.

The Immigration and Naturalization Service ("INS") has now instituted such a proceeding. The INS recently entered an Order to Show Cause charging that San Pedro is deportable under the laws of this country and have filed the order – the charging document in deportation proceedings – with the Office of the Immigration Court in Miami. San Pedro responded by filing the instant Petition for Writ of Mandamus or Prohibition and Temporary Restraining Order, in which he seeks a declaration that the institution of deportation proceedings against him violate the Plea Agreement. He seeks the issuance of a preliminary injunction and a writ of prohibition enjoining further deportation proceedings. San Pedro's request for this relief is predicated on two claims: 1) the government violated the Plea Agreement by instituting deportation against San Pedro and 2) due to its representations to him

that it would not institute such proceedings, the government must be estopped from pursuing the deportation proceedings.

On March 11, 1993, the government moved to dismiss both claims. As noted above, the Court converted the motion into a motion for summary judgment in an order dated June 18, 1993. The procedure governing the disposition of motions for summary judgment is well established. A party seeking summary judgment must demonstrate that "there is no genuine issue of material fact and that the moving party is entitled to summary judgment as a matter of law." Fed.R.Civ.P. 56(c). The movant bears the initial responsibility of informing the court of the basis for its motion and of identifying those materials which demonstrate the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). In response to a properly supported motion for summary judgment, the adverse party may not rest on the allegations or denials of his pleadings. Rather, the adverse party must set forth specific facts which show a genuine issue of material fact. Fed.R.Civ.P. 56(e). If the non-moving party fails to "make a sufficient showing on an essential element of her case with respect to which she has the burden of proof," then the Court must enter summary judgment for the moving party. *Celotex*, 477 U.S. at 323. The Court is not to resolve factual issues, but to determine whether factual issues exist. The Court must resolve all ambiguities and draw all justifiable inferences in favor of the non-moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986).

ANALYSIS

The Court will consider the government's motion with respect to each of the San Pedro's claims separately.

1) Breach of the Plea Agreement

The government offers three responses to San Pedro's claim that it breached the terms of the Plea Agreement. First, the government contends that it never represented to San Pedro that it would not institute deportation proceedings against him. Second, the government contends that even if it has made such representations they would not be binding since the Agreement contains a clause merging all prior agreements into the written Agreement and contains no promise to refrain from instituting deportation proceedings. Finally, the government asserts that the AUSAs who negotiated the Plea Agreement had no authority to promise San Pedro that he would not be deported and that any such promise made by them cannot bind the government.

The government has submitted no affidavits or other evidence in support of its contention that the AUSAs who negotiated the Plea Agreement made no representations that the government would not deport San Pedro. Moreover, San Pedro maintains that such representations were made. The issue is clearly one of fact and must be resolved by the trier of fact.

As noted, however, the government contends that the issue is not material. The Court disagrees. Section 8 of the Agreement provides that:

> The parties hereby agree that this document represents the full, complete and only agreement between the United States and the defendant, ALBERTO SAN PEDRO, regarding this matter, and that no promises or representations have been made which are not set forth herein. Additionally, any changes or modifications to this agreement must be in writing and signed by all parties.

Sections 5 through 7 set out the government's obligations under the Agreement. The section provides that:

> The United States, in consideration of the defendant's compliance with the terms and conditions of this Plea Agreement, agrees not to prosecute ALBERTO SAN PEDRO for any other offenses based upon any evidence revealed in the investigation that led to the charges in the subject indictment. In addition, the United States agrees not to prosecute ALBERTO SAN PEDRO based upon any other evidence of which it is now aware or which, with the exercise of reasonable diligence, it could presently become aware through communication with state or local enforcement personnel.

San Pedro contends that the term "prosecute" can be used to refer to both criminal *and* civil proceedings initiated by the government against an individual. Further, he asserts that the use of the term in section 5 creates an ambiguity concerning whether the section constitutes a promise not to initiate deportation proceedings against him. As an ambiguous plea agreement must be read against the government, he concludes that the section must be read to include such a promise.

The government responds that, in section 5, it promised not to prosecute San Pedro for any other *offenses* and points out that a deportation proceeding is a purely civil action to determine eligibility to remain in this country, not to punish unlawful entry. The government concludes that a deportation proceeding cannot be characterized as a prosecution for an offense. In this circuit, whether the government violated a plea agreement is judged according to the defendant's reasonable understanding at the time he entered the plea. *United States v. Rewis*, 969 F.2d 985, 988 (11th Cir. 1992). If the defendant's understanding is disputed by the government, the Court must determine the terms of the plea agreement according to objective standards. *Id.* This circuit has identified three principles which must guide interpretation of a plea agreement. First, the Court must avoid a "hyper-technical reading of the written agreement" and "a rigidly literal approach in the construction of language." *Id.* Second, the Court must view the written agreement "against the background of the negotiations" and must not read the agreement so that it directly contradicts a prior oral understanding. *Id.* Third, the Court must read an ambiguous plea agreement against the government. *Id.*

Application of these standards to the Plea Agreement in this case precludes the entry of summary judgment in favor of the government. The Court finds the terms "prosecute . . . for any other offenses" to be ambiguous. Deportation involves the imposition of a specific sanction – expulsion from the country. Moreover, in the present case, there is a close link between the sanction and San Pedro's history. As part of the Plea Agreement, San Pedro agreed to withdraw his appeals of two state convictions.

These convictions form the basis upon which the government seeks to deport him. San Pedro might thus have reasonably regarded deportation as an additional sanction for the offenses for which he was convicted in state court and might therefore reasonably have construed the terms "prosecute . . . for any other offenses" to cover the initiation of deportation proceedings.

Even if this were not the case, the Court would not enter summary judgment in favor of the government without receiving evidence concerning the government's alleged representations to San Pedro. As noted, the Court is obligated to interpret the Plea Agreement in the light of the negotiations preceding the execution of the Agreement. If agents of the government did promise San Pedro that he would not be deported, then it might well have been reasonable for him to believe that the phrase "prosecute . . . for any other offenses" covered deportation proceedings. The representations made by the government prior to the execution of the Plea Agreement are thus not only not irrelevant, they may have a pivotal bearing on what San Pedro might reasonably have interpreted that agreement to mean.

The government's second argument – that the AUSAs who negotiated the Plea Agreement had no authority to promise San Pedro that they would not deport him – also relies on disputed issues of fact. In support of its argument, the government cited the following passage from the U.S. Attorney's Manual:

> U.S. Attorneys should also be cognizant of the sensitive areas where plea agreements involve either extradition or deportation. No U.S. Attorney has the authority to negotiate regarding an

> extradition or deportation order in connection with any case. If extradition has been requested or there is reason to believe that such a request will be made, or if a deportation action is pending or completed, U.S. Attorneys or AUSAs, before entering negotiations regarding such matters, must seek specific approval from the Assistant Attorney General, Criminal Division.

United States Attorneys Manual, (USAM) Chapter 16 § 9-16.020 (October 1, 1988). The government asserts that this language unequivocally demonstrates that AUSAs do not have the authority to bind the government regarding the deportation of a criminal defendant.

The Court disagrees. While the second sentence of the section appears to deprive an AUSA of this authority, the sentence must be read in conjunction with the last sentence. The last sentence suggests that an AUSA has the authority if he or she obtains approval from the Assistance Attorney General for the Criminal Division of the Department of Justice to negotiate regarding deportation. Neither party has submitted any evidence concerning whether the AUSAs who negotiated the Plea Agreement on behalf of the government had obtained such approval.

In addition, in response to the Court's request for evidence concerning the status of the United States Attorneys Manual, counsel for San Pedro submitted a copy of section 1-100 of the manual. That section provides that the Manual only provides internal guidance within the Department of Justice and does not have the force of law. *See* USAM § 1-1.100. As a result, the fact that the manual purports to deprive AUSAs of the power to negotiate

concerning deportation would not prove conclusively that they do not have such power. The Court concludes that an issue of material fact exists concerning whether the AUSAs who negotiated the Plea Agreement had the authority to bind the government with the respect to the initiation of deportation proceedings against San Pedro.

2) Estoppel

In order to sustain a claim for estoppel against the government, a plaintiff must establish that: 1) the traditional elements of estoppel are satisfied, 2) the government acted in its proprietary capacity rather than its sovereign capacity when it engaged in the conduct giving rise to estoppel, and 3) the government's agent acted within the scope of the agent's authority. *United States v. Killough*, 848 F.2d 1523, 1526 (11th Cir. 1988); *United States v. Vonderau*, 837 F.2d 1540, 1541 (11th Cir. 1988). The government advances two arguments in support of its motion for summary judgment with respect to San Pedro's claim of estoppel. First, the government asserts that it was acting in its sovereign capacity when negotiating the Plea Agreement. Second, it contends that the AUSAs who negotiated the Agreement did not have the authority to promise San Pedro that he would not be deported.

The Court addressed the government's second argument above. The Court therefore turns to the government's first argument. In *FDIC v. Harrison*, 735 F.2d 408, 411 (11th Cir. 1984), the Eleventh Circuit explained the distinction between actions taken in the government's proprietary capacity and those taken in its sovereign capacity, stating that:

> Proprietary governmental functions include essentially commercial transactions involving the purchase or sale of goods and services and other activities for the commercial benefit of a particular government agency. Whereas in its sovereign role, the government carries out the unique governmental functions for the benefit of the whole public, in its proprietary capacity the government's activities are analogous to those of a private concern.

Under this standard, it is clear that when the government undertakes a criminal prosecution, it is acting in its sovereign capacity. The executive branch of the federal government has the exclusive authority and absolute discretion to decide whether to prosecute a case. *United States v. Nixon,* 418 U.S. 683, 693 (1974). Moreover, the prosecutorial function is to be exercised for the benefit of the public as a whole, not for the commercial benefit of a particular governmental agency. Therefore, when the government prosecutes a criminal case, it acts in its sovereign capacity. Plea negotiating is intimately connected with, and forms an integral part of, most criminal prosecutions. As a result, when the government negotiates a plea agreement, it also acts in its sovereign, not its proprietary, capacity. Finally, it is well established that when the government expels an alien it acts in its sovereign capacity. *See Nishimura Ekiu v. United States,* 142 U.S. 651, 659 (1892). The Court concludes that, if the government promised San Pedro that it would not deport him, the action was made in the government's sovereign capacity and that, as a result, San Pedro's claim for estoppel does not lie against the government.

San Pedro offers two arguments in opposition to this conclusion. He contends that the cases that have incorporated the sovereign capacity/proprietary capacity distinction into the test for estoppel arose in the civil, not the criminal context. This argument is meritless. The Eleventh Circuit most recently endorsed the inclusion of the distinction in the test for estoppel in *United States v. Killough*, 848 F.2d 1523, 1526 (11th Cir. 1988). Like the present case, *Killough* involved an attempt by [sic] to estop a civil action brought by the government. The defendant based his claim for estoppel on representations made to him [sic] the AUSA who prosecuted his criminal case. As part of the plea agreement in the criminal case, the AUSA had promised him that the government would take no further action against him. The Eleventh Circuit denied estoppel and endorsed the three factor test cited above. *Id.*

San Pedro's second argument is also meritless. He contends that when a defendant's constitutional rights are at issue, the government may be estopped on the same terms as any other entity. San Pedro, however, does not identify how his constitutional rights are in any way implicated by the government's initiation of a deportation proceeding against him. As an alien, San Pedro has no constitutional right to remain in the United States and is subject to the plenary power of Congress to determine what noncitizens are permitted to remain in the country. *See Carlson v. Landon*, 342 U.S. 524, 534 (1952).

Based on the foregoing, it is hereby

ORDERED and ADJUDGED that the government's motion is DENIED with respect to San Pedro's claim for

breach of the Plea Agreement and GRANTED with respect to his claim for estoppel. It is further ORDERED and ADJUDGED that summary judgment is entered in favor of the government with respect to San Pedro's claim for estoppel.

DONE and ORDERED, in chambers, Miami, Florida, this 23 day of August 1993.

/s/ Lenore C. Nesbitt
LENORE C. NESBITT
UNITED STATES
DISTRICT JUDGE

cc: counsel of record

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 93-0039-NESBITT

ALBERTO SAN PEDRO,

Plaintiff,

vs.

UNITED STATES, et al.,

Defendants.

_____/

ORDER GRANTING SUMMARY JUDGMENT

This cause comes before the Court upon Defendants' Second Motion For Summary Judgment; Defendants' Third Motion For Summary Judgment; and Plaintiff Alberto San Pedro's ("San Pedro") Objection To Defendants' Motion For Enlargement Of Time To File Memorandum Of Law On Legal Authority Of U.S. Attorney, Motion For Default, And Motion For Reconsideration.

BACKGROUND

This case arises out of a dispute concerning the scope of a plea agreement ("the Plea Agreement") between the United States government and Plaintiff Alberto San Pedro ("San Pedro") and concerning the representations made during the negotiations that preceded the execution of the agreement. San Pedro is a citizen of Cuba and has been a lawful permanent resident of the United States since May 2, 1956. On October 7, 1988, a federal grand jury returned a three count indictment against San Pedro

in *United States v. Alberto San Pedro*, Case No. 88-0677-Cr-Aronovitz. The indictment included two counts for bribery and one count for conspiracy to commit bribery.

In July 1989, San Pedro entered the Plea Agreement, in which he pled guilty to the conspiracy count. Under the express terms of the agreement, the United States agreed not to prosecute San Pedro for any other offenses based upon any evidence revealed in the investigation that led to the indictment, and on any evidence of which it was then aware or could be aware in the exercise of due diligence. The government concedes that the Plea Agreement provides San Pedro with transactional immunity[1]. According to San Pedro, the Assistant United States Attorneys ("AUSAs") negotiating on behalf of the government also represented to him that, as part of the agreement, the government would not institute deportation proceedings against him.

The Immigration and Naturalization Service ("INS") has now instituted such a proceeding. Last year, the INS

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[1] The relevant clause of the Plea Agreement provides that:

> The United States, in consideration of the defendant's compliance with the terms and conditions of this Plea Agreement, agrees not to prosecute ALBERTO SAN PEDRO for any other offenses based upon any evidence revealed in the investigation that led to the charges in the subject indictment. In addition, the United States agrees not to prosecute ALBERTO SAN PEDRO based upon any other evidence of which it is now aware or which, with the exercise of reasonable diligence, it could presently become aware through communication with state or local enforcement personnel.

entered an Order to Show Cause charging that San Pedro is deportable under the laws of this country and filed the order – the charging document in deportation proceedings – with the Office of the Immigration Court in Miami. San Pedro responded by filing the instant Petition for Writ of Mandamus or Prohibition and Temporary Restraining Order, in which he seeks a declaration that the institution of deportation proceedings against him violates the Plea Agreement. He seeks the issuance of a preliminary injunction and a writ of prohibition enjoining further deportation proceedings. San Pedro's request for this relief is predicated on two claims: 1) the government violated the Plea Agreement by instituting deportation against San Pedro and 2) due to its representations to him that it would not institute such proceedings, the government must be estopped from pursuing the deportation proceedings.

On March 11, 1993, the government moved to dismiss both claims. The Court converted the motion into a motion for summary judgment in an order dated June 18, 1993. On August 24, 1993, the Court entered an Order denying summary judgment with respect to San Pedro's claim for breach of the Plea Agreement, but granting summary judgment with respect to his estoppel claim.

In support of its motion for summary judgment regarding San Pedro's claim that the government violated the Plea Agreement, the government asserted that: 1) the Plea Agreement includes no promise not to deport San Pedro; 2) the U.S. Attorney and AUSAs who negotiated the agreement never made any such promise orally; and 3) even if they made such a promise, either orally or in

writing, their promise cannot bind the INS because they had no authority to make it.

In its August 24, 1993 Order, the Court rejected these arguments. With regard to the government's third argument, the Court found that the United States Attorney's Manual ("the Manual") – the authority cited by the government for the proposition that the U.S. Attorney's who negotiated the Plea Agreement lacked the authority to promise San Pedro that the INS would not deport him – does not appear to *deprive* a U.S. Attorney or AUSA of the authority to negotiate regarding the deportation of a criminal defendant. Rather, the Court found that the Manual simply requires a U.S. Attorney to obtain approval from the Assistant Attorney General for the Criminal Division of the Department of Justice prior to conducting such negotiations. Since the government produced no evidence concerning whether the U.S. Attorneys sought authorization from the Department of Justice, the Court denied the government's request for summary judgment.

In an effort to correct the deficiencies identified by the Court in its original motion for summary judgment, the government has now filed two additional motions for summary judgment. These second and third motions for summary judgment address respectively the questions whether the U.S. Attorney and AUSAs assigned to the San Pedro case ever promised San Pedro that he would not be deported and, if so, whether they had the authority to make such a promise.

On May 9, 1994, the Court held a status conference at which it heard oral argument on these motions. At the

conference, the Court indicated that it would deny the government's second motion for summary judgment. The Court ordered supplemental briefing concerning the question whether the U.S. Attorney and AUSAs who negotiated the Plea Agreement had the authority to promise San Pedro that he would not be deported, however, and deferred ruling on the government's third motion for summary judgment pending receipt of the required supplemental briefs. Those briefs have now been filed and the motion is ripe for disposition.

Prior to considering the government's third motion for summary judgment, the Court must review the procedure resolution of a motion for summary judgment. A party seeking summary judgment must demonstrate that "there is no genuine issue of material fact and that the moving party is entitled to summary judgment as a matter of law." Fed.R.Civ.P. 56(c). The movant bears the initial responsibility of informing the court of the basis for its motion and of identifying those materials which demonstrate the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). In response to a properly supported motion for summary judgment, the adverse party may not rest on the allegations or denials of his pleadings. Rather, the adverse party must set forth specific facts which show a genuine issue of material fact. Fed.R.Civ.P. 56(e). If the non-moving party fails to "make a sufficient showing on an essential element of her case with respect to which she has the burden of proof," then the Court must enter summary judgment for the moving party. *Celotex*, 477 U.S. at 323. The Court is not to resolve factual issues, but to determine whether factual issues exist. The Court must resolve all ambiguities and draw all

justifiable inferences in favor of the non-moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986).

THE GOVERNMENT'S THIRD MOTION FOR SUMMARY JUDGMENT

The government's third motion for summary judgment raises the question whether U.S. Attorneys and AUSAs have the authority to promise a criminal defendant as part of a plea agreement that he or she will not be deported. Resolution of the question turns on whether the Attorney General has delegated to the nation's U.S. Attorneys and/or AUSAs some, or all, of her statutory authority to make such promises.

The power to promise a criminal defendant that he or she will not be deported forms part of the authority vested in the Attorney General by 8 U.S.C. § 1103(a) to administer and enforce federal immigration law. *See* 8 U.S.C. § 1103(a). Under section 1103(a), the Attorney General is authorized to delegate this authority to both the INS and the Department of Justice. *Id.* ("He (the Attorney General) may require or authorize any employee of the (Immigration and Naturalization) Service to perform or exercise any of the powers, privileges, or duties conferred or imposed by this Act . . . "). In 8 C.F.R. 2.1, the Attorney General delegated significant administrative and enforcement authority to the Commissioner of the INS. *See* 8 C.F.R. 2.1 ("[T]here is delegated to the Commissioner the authority of the Attorney General to direct the administration of the Service and to enforce the (Immigration) Act and all other laws relating to the immigration and naturalization of aliens.").

The parties dispute whether the Attorney General has made any such delegation to the nation's U.S. Attorneys and AUSAs. They agree, however, that sections 9-16.020 and 9-73.510 of the United States Attorneys Manual ("USAM") are the only possible sources of such a delegation. Section 9-16.020 provides that:

> U.S. Attorneys should also be cognizant of the sensitive areas where plea agreements involve either extradition or deportation. No U.S. Attorney or AUSA has the authority to negotiate regarding an extradition or deportation order in connection with any case. If extradition has been requested or there is reason to believe that such a request will be made, or if a deportation action is pending or completed, U.S. Attorneys or AUSAs, before entering negotiations regarding such matters, must seek specific approval from the Assistant Attorney General, Criminal Division.

USAM § 9-16.020. Section 9-73.510 provides that:

> In a criminal case, the United States Attorney should not as part of a plea agreement or an agreement to testify, or for any other reason, promise an alien that he/she will not be deported, without prior authorization from the Criminal Division.

USAM § 9-73.510.

Upon review, the Court finds that these sections, whether read independently or together, do not constitute a delegation of authority to U.S. Attorneys and AUSAs from the Attorney General. There are several reasons for this. For instance, although the government argues to the contrary, the Court is not convinced that, as

currently drafted, the USAM could constitute the source of such a delegation. It is well established that the USAM only provides guidance to officials at the Department of Justice and does not have the force of law. *U.S. v. Carson*, 969 F.2d 1480, 1495 n.8 (3d Cir. 1992) ("Though the Manual is not binding on United States Attorneys, it is designed to serve as a guide to their conduct . . . "); *United States v. North*, 1988 U.S. Dist. Lexis 16017 (D.D.C. 1988) ("The United States Attorney's Manual is not published in the United States Code or Code of Federal Regulations and none of its provisions are promulgated through the Federal Register. It does not have the force of law."); *United States v. Huslage*, 480 F.Supp. 870, 873 (W.D.Pa. 1979) ("The procedures set forth in the United States Attorneys' Manual are not binding on the district offices . . . "). The USAM itself states that:

> The Manual provides only internal Department of Justice guidance. *It is not intended to, and may not be relied upon to create any rights, substantive or procedural, enforceable at law by any party in any matter civil or criminal.* Nor are any limitations hereby placed on otherwise lawful litigative prerogatives of the Department of Justice.

USAM § 1-1.000 (emphasis added). San Pedro relies on the USAM as the source of a U.S. Attorney/AUSA's authority to promise non-deportation and, thus, as the ultimate source of his right against deportation. The underlined language makes clear that the USAM cannot serve as the source of such a right, however. Put another way, the language of section 1-1.000 establishes that the Attorney General did not intend the USAM to serve as

the vehicle for the delegation of authority to U.S. Attorneys and AUSAs.

Even if the USAM could serve as the source of a delegation of the Attorney General's authority to promise non-deportation, the language in sections 9-16.020 and 9-73.510 is insufficient to effect such a delegation. In order to be effective, a delegation of statutory authority from the Attorney General to other federal officials must be both *explicit* and *affirmative*. In *United States v. Peres*, 645 F.Supp. 697, 704 (D.Col. 1986), the United States District Court for the District of Colorado explained that:

> It is a well settled point of law that subdelegation of authority from the attorney general to an administrative agency is a valid authorization of power . . . The logical and necessary implication of that rule of law is that there must be an *affirmative act* on the part of the attorney general in which he subdelegates his authority. If the attorney general were not required to execute an affirmative act, the authority of other administrative agencies *vis. a vis.* the authority of the attorney general would be hopelessly ambiguous and unworkable.

645 F.Supp. at 704 (emphasis in original); *see also, United States v. Touby*, 909 F.2d 759, 770 (3d Cir. 1990) ("The Touby's final delegation argument is that . . . the Attorney General failed to expressly subdelegate his section 811(h) authority. Unquestionably, he must do so *explicitly* in order for the subdelegatee to be empowered to act." (emphasis added)).

The need for express delegations in the areas of immigration and naturalization is particularly acute. The

area is one in which the Attorney General has already delegated significant authority to another administrative agency – the INS. As a result, the Attorney General must take special care to make delegations of authority in this area to officials outside INS with particular clarity. Otherwise, confusion, and often litigation, concerning the scope of the authority of the INS and that of the other delegatee will likely result.

Confusion of this kind is at the heart of this case. As noted, the Attorney General has delegated to the INS includes the authority to initiate and prosecute deportation proceedings. *See* 8 C.F.R. § 2.1. Absent a clear, explicit delegation of authority to U.S. Attorneys and AUSAs of the authority to promise non-deportation to criminal defendants, officials at INS may initiate deportation proceedings against a particular defendant without considering whether an AUSA or U.S. Attorney has promised the defendant non-deportation as part of a plea agreement. Protracted litigation arising out of the ambiguity concerning the authority of the U.S. Attorneys and AUSA is the likely result. That is precisely what occurred here.

Neither section 9-73.510 not [sic] section 9-16.020 contain an explicitly, affirmative delegation to U.S. Attorneys and AUSAs of the Attorney General's authority to promise non-deportation. To the contrary, both sections expressly *limit* the authority of U.S. Attorneys and AUSAs to make such promises. Section 9-73.510 is particularly clear. The section unequivocally provides that, unless a U.S. Attorney obtains prior authorization from the Criminal Division of the Department of Justice, the U.S. Attorney should not *promise* an alien as part of a plea

agreement that he or she will not be deported. Section 9-16.020 goes even further. The section provides that, if a deportation action against a criminal defendant is pending or completed, a U.S. Attorney or AUSA cannot even *negotiate* regarding deportation without obtaining *specific approval* from the Assistant Attorney General of the Criminal Division of the Department of Justice. Nothing in these sections remotely suggests that a U.S. Attorney or AUSA has the authority to negotiate, or to promise anything, concerning deportation absent such approval[2].

Based on the foregoing, the Court concludes that sections 9-16.02 and 9-73.510 do not constitute a delegation of authority to U.S. Attorneys and AUSAs to promise non-deportation to criminal defendants in the context of plea negotiations. Accordingly, the Court concludes that the U.S. Attorney and AUSAs who negotiated the Plea Agreement with San Pedro did not have the authority to promise him that he would not be deported. It is therefore

ORDERED and ADJUDGED that the government's third motion for summary judgment is GRANTED. It is further ORDERED and ADJUDGED that the government's second motion for summary judgment is DENIED as moot and that San Pedro's motion for default and motion for reconsideration are DENIED.

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[2] The Court notes that the government has produced unrebutted evidence indicating that the U.S. Attorney and AUSAs who negotiated the Plea Agreement never obtained from any official at the Criminal Division of the Department of Justice the authorization to negotiate with San Pedro concerning deportation.

DONE and ORDERED, in chambers, Miami, Florida, this 18th day of August 1994.

/s/ Lenore C. Nesbitt
LENORE C. NESBITT
UNITED STATES
DISTRICT JUDGE

cc:
Dexter A. Lee, AUSA
Fred A. Schwartz, Esq.

Supreme Court, U.S.
FILED
OCT 9 1996
CLERK

(2)

No. 96-40

In the Supreme Court of the United States

OCTOBER TERM, 1996

ALBERTO SAN PEDRO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether a United States Attorney's Office may bind the Immigration and Naturalization Service not to deport a criminal alien even though the Attorney General has not delegated to United States Attorney's Offices the actual authority to do so.

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-32) is reported at 79 F.3d 1065. The opinions of the district court (Pet. App. 33-44, 45-56) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 9, 1996. The petition for a writ of certiorari was filed on July 8, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner is a citizen of Cuba who has been a lawful permanent resident of the United States since

May 2, 1956. Pet. App. 2. In October 1988, a federal grand jury in the Southern District of Florida returned a three-count indictment against petitioner, charging him with two counts of bribery and one count of conspiracy to commit bribery. *Id.* at 45-46. In July 1989, petitioner entered into a plea agreement with the United States Attorney's Office for the Southern District of Florida. *Id.* at 46. As part of that plea agreement, petitioner agreed to plead guilty to conspiracy to commit bribery. The United States agreed to drop the two bribery counts and not to prosecute petitioner "for any other offenses based upon any evidence revealed in the investigation that led to the indictment" or information of which the government "was then aware or could be aware in the exercise of due diligence." *Ibid.*[1] On July 12, 1989, petitioner was convicted of conspiracy to commit bribery on his plea of guilty, and on September 28, 1989, was sentenced to 30 months in prison, with credit for time served. *United States* v. *San Pedro*, 781 F. Supp. 761, 764-765 (S.D. Fla. 1991).

---

[1] The plea agreement provided, in pertinent part, that:

> The United States, in consideration of the defendant's compliance with the terms and conditions of this Plea Agreement, agrees not to prosecute [petitioner] for any other offenses based upon any evidence revealed in the investigation that led to the charges in the subject indictment. In addition, the United States agrees not to prosecute [petitioner] based upon any other evidence of which it is now aware or which, with the exercise of reasonable diligence, it could presently become aware through communication with state or local enforcement personnel.

Pet. App. 46 n.1.

2. In December 1989, the Immigration and Naturalization Service (INS) issued an Order to Show Cause, charging petitioner with deportability based upon two prior state convictions. C.A. R.E. Doc. 1, Exh. 3.[2] In November 1992, INS formally instituted deportation proceedings against petitioner. Petitioner then filed in the United States District Court for the Southern District of Florida a petition for writ of mandamus or prohibition and temporary restraining order, contending that the institution of deportation proceedings by the INS violated the plea agreement into which he had entered with the government. Petitioner alleged that the agreement itself prohibited the government from undertaking deportation proceedings and that the government should be estopped from deporting him because of representations allegedly made by officials from the United States Attorney's Office during the plea negotiations that petitioner would not be deported if he agreed to plead guilty to the conspiracy charge. Pet. App. 47.

In motions to dismiss and for summary judgment, the government argued that petitioner was never promised that he would not be deported, and that even if he was, the United States Attorney's Office lacked the authority to promise not to deport petitioner because such authority has not been delegated to the United States Attorney in the Immigration and Na-

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[2] In October 1971, petitioner was convicted in Florida state court of conspiracy to commit murder in the first degree and carrying a concealed firearm. C.A. R.E. Doc. 1, Exh. 3. In May 1988, he was convicted in Florida on state charges of six counts of unlawful compensation and one count of conspiracy to traffic in cocaine. *Ibid.*

tionality Act (INA), 8 U.S.C. 1101 *et seq.*, or applicable Department of Justice regulations. Pet. App. 47-51.

The district court determined that a dispute existed whether the government made the promise not to deport petitioner in the plea negotiations, but concluded that nothing in the United States Attorneys' Manual (USAM) or INA gave the United States Attorney the authority to bind the INS with respect to a promise not to deport. Accordingly, the district court entered summary judgment for the government. Pet. App. 4, 55.

3. The court of appeals affirmed. Pet. App. 1-15.[3] For purposes of its decision, the court assumed that petitioner had been promised nondeportation. The court then held that the United States Attorney's Office lacked the actual authority to make the promise. *Id.* at 6, 9. Citing 8 U.S.C. 1103(a) and (b), the court held that Congress has placed sole authority to enforce the immigration laws, including the power to deport criminal aliens, with the Attorney General. Pet. App. 9. The court concluded that, because the Attorney General has not clearly and explicitly delegated that authority to United States Attorneys, a United States Attorney or an Assistant United States Attorney cannot preclude the INS from initiating a deportation proceeding against a criminal alien. *Id.* at 14.

Senior District Judge Goettel, sitting by designation, dissented. He reasoned that the issue was

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[3] The court of appeals noted that petitioner was not seeking to vacate his guilty plea for the conspiracy charge, but rather was seeking only enforcement of the purported promise not to deport him. Pet. App. 5. Accordingly, the petition for a writ of certiorari does not raise an issue with respect to petitioner's conviction for conspiracy.

"whether there has been a violation of [petitioner]'s fundamental right to due process if, in fact, the government reneged on a prosecutorial promise made as part of San Pedro's plea agreement." Pet. App. 15. He nonetheless agreed with the majority that "[c]learly the United States Attorney's Office did not have the express authority to promise a criminal defendant that he would not be deported as part of a plea bargain." *Id.* at 30. He believed, however, that the case should be remanded to the district court for further fact-finding on the issue whether a promise not to deport had actually been made by the United States Attorney's Office. *Id.* at 32.

ARGUMENT

1. Petitioner contends (Pet. 8, 12-13) that this Court's review is warranted to resolve a conflict among the courts of appeals over whether a United States Attorney's Office has authority to promise a criminal defendant that he will not be deported, and thereby bind the INS not to deport him. In light of a recent Department of Justice regulation that makes clear that United States Attorney's Offices lack the authority to bind the INS in deportation decisions without the INS's written consent, the disagreement in the circuits is unlikely to persist and does not warrant this Court's review.

a. As the court of appeals correctly ruled, Congress has "placed the responsibility of enforcing the [Immigration and Nationality Act] in the hands of the attorney general, who in turn is permitted to delegate her powers to the commissioner of the INS." Pet. App. 9 (citing 8 U.S.C. 1103(a) and (b); 8 C.F.R. 2.1; *INS* v. *Phinpathya*, 464 U.S. 183, 185 n.1 (1984)). The Attorney General has delegated to the INS Commis-

sioner and her designees the authority to initiate deportation proceedings, 8 C.F.R. 242.1(a), as well as to cancel an order to show cause why the alien should be deported, 8 C.F.R. 242.7. These delegations vest no authority in a United States Attorney either to initiate or to terminate a deportation proceeding.

b. Petitioner asserts (Pet. 12) that a United States Attorney nonetheless has the power to bind the INS in its deportation proceedings through a promise made during plea negotiations over a criminal charge. The court of appeals correctly rejected that argument. For purposes of the case, the court assumed that a promise in fact had been made, although the court acknowledged that a factual dispute existed as to that issue. The court then applied longstanding principles that the government agent must have the authority to make the promise before it can be enforced against the government. Pet. App. 5-6 (citing *United States* v. *Kettering*, 861 F.2d 675, 677 (11th Cir. 1988)). "Estoppel and apparent authority normally will not substitute for actual authority to bind the United States government." Pet. App. 6 (quoting *Thomas* v. *INS*, 35 F.3d 1332, 1338 (9th Cir. 1994)). See also *Federal Crop Ins. Corp.* v. *Merrill*, 332 U.S. 380, 384 (1947) ("Whatever the form in which the Government functions, anyone entering into an arrangement with the Government takes the risk of having accurately ascertained that he who purports to act for the Government stays within the bounds of his authority."); *Utah Power & Light Co.* v. *United States*, 243 U.S. 389, 408-409 (1917) ("[T]he United States is neither bound nor estopped by acts of its officers or agents in entering into an arrangement or agreement to do or cause to be done what the law does not sanction or permit.").

The court concluded that the United States Attorney lacked actual authority to make a promise that petitioner would not be deported because the United States Attorney had not been delegated authority by the Attorney General either to deport or to bind the INS with respect to deportation. The guidance provided in the USAM did not "contain an explicit, affirmative delegation to U.S. Attorneys and AUSAs of the Attorney General's authority to promise nondeportation." Pet. App. 13.[4] Indeed, as the court

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[4] As the court below found, "[t]he parties dispute whether such a delegation has been made [by the Attorney General to the United States Attorneys], but they agree the only possible sources of delegation are §§ 9-16.020 and 9-73.510 of the USAM." Pet. App. 10 (footnotes omitted). Section 9-16.020 provides as follows:

> U.S. Attorneys should also be cognizant of the sensitive areas where plea agreements involve either extradition or deportation. No U.S. Attorney or AUSA has the authority to negotiate regarding an extradition or deportation order in connection with any case. If extradition has been requested or there is reason to believe that such a request will be made, or if a deportation action is pending or completed, U.S. Attorneys or AUSAs, before entering negotiations regarding such matters, must seek specific approval from the Assistant Attorney General, Criminal Division.

Section 9-73.510 provides as follows:

> In a criminal case, the United States Attorney should not as part of a plea agreement or an agreement to testify, or for any other reason, promise an alien that he/she will not be deported, without prior authorization from the Criminal Division.

Pet. App. 10 nn.4 & 5. As petitioner concedes (Pet. 6), the INS issued its deportation order *after* the plea agreement was consummated. Consequently the approval provision in Section 9-16.020 is inapplicable, because the deportation action was not

found, the USAM "expressly *limit[s]* the authority of U.S. Attorneys and AUSAs to make such promises." *Ibid.* Absent the actual authority to make a promise not to deport petitioner, "the agreement is unenforceable." *Id.* at 5 (quoting *Kettering*, 861 F.2d at 677).

2. Petitioner correctly notes (Pet. 8) that courts of appeals have reached conflicting results on the question whether United States Attorney's Offices may bind the INS on immigration matters. Compare *Thomas* v. *INS*, 35 F.3d 1332 (9th Cir. 1994) (may bind INS), and *Margalli-Olvera* v. *INS*, 43 F.3d 345 (8th Cir. 1994) (same), with Pet. App. 6-9 (may not bind INS). That conflict, however, has been ameliorated by a recent change in the Department of Justice regulations, and therefore does not warrant further review by this Court.

a. In *Thomas*, the Ninth Circuit's analysis turned on the actual authority of the United States Attorney to make a plea agreement that would bind the INS not to deport an individual. Absent such authority, the court acknowledged the unenforceability of a promise by a United States Attorney that the INS would not initiate deportation proceedings. 35 F.3d at 1338. After finding "no express grant of authority to United States Attorneys to bind the 'government' not to oppose motions for relief from deportation to the INS," *id.* at 1339, the court nonetheless concluded that such authority in United States Attorney's

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"pending or completed" when the promise was alleged to have been made. Nor is there any indication in the record that the Criminal Division gave prior authorization for any alleged agreement by the United States Attorney not to deport petitioner, thus making a possible delegation of authority pursuant to Section 9-73.510 inapplicable in this case.

Offices should be found to be implied from the general power of United States Attorneys to make agreements pursuant to their authority to "prosecute for all offenses against the United States," *ibid.*, citing 28 U.S.C. 547(1).

The *Thomas* court expressly invited the Attorney General to clarify through regulation when a United States Attorney may promise in a plea agreement that the government will not deport a defendant:

> If the Attorney General wished to limit the incidental authority of United States Attorneys in this respect, she could easily do so with a section in the Code of Federal Regulations, but she has not chosen to do that. As a matter of administrative prudence the Department of Justice might wish to have some internal coordinating procedure for agreements by United States Attorneys which affect the Immigration and Naturalization Service.

Thomas, 35 F.3d at 1341.

b. Similarly, in *Margalli-Olvera* v. *INS*, 43 F.3d 345 (8th Cir. 1994), the court addressed whether an explicit written plea agreement by the United States Attorney that "the United States will recommend against deportation," *id.* at 348, could bind the INS in a subsequent deportation proceeding. The Eighth Circuit in *Margalli-Olvera* stated that it was following the Ninth Circuit in *Thomas*, and acknowledged that such a written, express agreement would be unenforceable if the United States Attorney lacked the actual authority to make the promise. *Id.* at 353. But the *Margalli-Olvera* court agreed with the Ninth Circuit that "an Assistant United States Attorney has actual authority to bind the INS" by virtue of the

delegation given to prosecute offenses against the United States absent any restriction on that authority by the Attorney General. *Id.* at 354.

c. To resolve the uncertainty created by the *Thomas* and *Margalli-Olvera* decisions, the Attorney General has recently issued new regulations codifying the United States' position that federal prosecutors, law enforcement agencies, and other officials must "obtain written consent" from the INS "when entering into a plea agreement, cooperation agreement, or similar agreement promising an alien favorable treatment * * * under the immigration laws." 61 Fed. Reg. 48,405 (Sept. 13, 1996).[5] The rule provides as follows:

> The Immigration and Naturalization Service (Service) shall not be bound, in the exercise of its authority under the immigration laws, through plea agreements, cooperation agreements, or other agreements with or for the benefit of alien defendants, witnesses, or informants, or other aliens cooperating with the United States Government, except by the authorization of the Commissioner of the Service or the Commissioner's delegate. Both the agreement itself and the necessary authorization must be in writing to be effective, and the authorization shall be attached to the agreement.

App., *infra*, 5a.

By clarifying that the United States Attorneys lack authority to bind the INS, the new regulation

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[5] The new regulation is set out in full in App., *infra*, 1a-5a. The interim rule is effective October 15, 1996, with written comments to be submitted on or before November 12, 1996. *Id.* at 1a.

eliminates the basis of the court of appeals' rulings that were in conflict with the decision by the court below. Both the Ninth Circuit in *Thomas* and the Eighth Circuit in *Margalli-Olvera* inferred actual authority absent a clear statement in the Department of Justice regulations delineating when a promise by a United States Attorney may properly bind the INS in a deportation proceeding. Those two circuits have not had an opportunity to reassess the continuing validity of *Thomas* and *Margalli-Olvera* in light of the new regulations, and it is doubtful that those courts would now conclude that United States Attorneys have actual authority to bind the INS with respect to deportation orders. Accordingly, the circuit conflict cited by petitioner is likely to disappear and does not at present warrant this Court's review.

3. Petitioner's argument that the United States violated his right to constitutional due process does not warrant this Court's review. First, the cases upon which he relies do not support his claim. In *Santobello* v. *New York*, 404 U.S. 257, 258 (1971), the defendant entered into a plea agreement that obligated the government to remain silent when asked if it had a sentence recommendation. The promise made by the prosecutor was squarely within his actual authority. In *Giglio* v. *United States*, 405 U.S. 150, 154 (1972), the Court held that due process required a prosecutor to reveal to a defendant a promise not to prosecute the government's chief witness in return for the witness's truthful testimony. Contrary to petitioner's assertion (Pet. 10-11), *Santobello* and *Giglio* do not stand for the proposition that the Due Process Clause requires the specific performance of *any* promise made by a prosecutor, regardless of whether the prosecutor had actual authority to make

the promise. Petitioner cites no case that holds that the United States may be bound by a promise made outside the agent's authority. Accordingly, his due process challenge was correctly rejected by the court below and does not warrant further review by this Court.[6]

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[6] This case is also unworthy of review by this Court because there was no promise by the United States Attorney's Office that the government would not deport petitioner. Neither the court of appeals nor the district court made the fact-findings necessary to support petitioner's claim because of their conclusion that any alleged promise would have been unenforceable for lack of actual authority. Petitioner claims that during the plea negotiations pursuant to his 1988 federal indictment, the United States government orally promised him that he would not be deported as a result of his conviction.

That allegation is directly contradicted by admissions in two other cases, in which petitioner represented that "[a]lthough it was not reflected in the plea agreement, the government had agreed to *recommend* that he not be deported as a result of his conviction." C.A. R.E. Doc. 53, Exh. A, at 11, Exh. B, at 6-7 (emphasis supplied). Additionally, petitioner's former counsel testified at a hearing on July 15, 1991, before the magistrate judge that the United States Attorney's Office agreed only to write a letter to the INS asking it to consider petitioner's cooperation and recommending that he not be deported. C.A. R.E. Doc. 53, Exh. D. Finally, in September 1990, petitioner's counsel wrote a letter to an Assistant United States Attorney regarding petitioner's immigration status. C.A. R.E. Doc. 53, Exh. E. In that letter, she detailed the plea negotiations, highlighting the fact that the United States Attorney's Office refused to place a "no deportation" clause in the plea agreement because the United States Attorney's Office had no authority to bind the INS. *Ibid.*

Thus, at most the government agreed only to make a recommendation against deportation, and the United States Attorney's Office fulfilled that promise. The office recommended to the INS that it favorably consider petitioner's cooperation in

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WALTER DELLINGER
Acting Solicitor General
FRANK W. HUNGER
Assistant Attorney General
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JANE GOMEZ
Attorneys

OCTOBER 1996

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deciding whether or not to continue deportation proceedings. C.A. R.E. Doc. 53, Exh. C. The statements in the motions filed by petitioner's counsel that the government agreed to *recommend* that he not be deported are admissions that no *promise* was made by the government that he would not be deported. See *Camacho-Bordes* v. *INS*, 33 F.3d 26, 28 (8th Cir. 1994) (government agreement to recommend against deportation does not bind INS from deporting criminal alien).

APPENDIX

61 Fed. Reg. 48,405 (Sept. 13, 1996) provides:

Rules and Regulations

* * * * *

DEPARTMENT OF JUSTICE

Immigration and Naturalization Service

28 CFR Part 0

[INS No. 1791-96; AG Order No. 2055-96]

RIN 1115-AE50

Agreements Promising Non-Deportation or Other Immigration Benefits

AGENCY: Department of Justice.

ACTION: Interim rule with request for comments.

SUMMARY: This interim rule requires Federal prosecutors, law enforcement agencies, and other officials to obtain written consent from the Immigration and Naturalization Service (Service) when entering into a plea agreement, cooperation agreement, or similar agreement promising an alien favorable treatment by the Service. This rule ensures that favorable treatment under the immigration laws is extended only after a full consideration of its effect on overall immigration enforcement, alleviates confusion over the authority to enforce the immigration laws, and prevents the Service from being bound by agreements undertaken without its knowledge and

approval. The rule codifies a long-standing position of the Department of Justice.

DATES: This interim rule is effective October 15, 1996. Written comments must be submitted on or before November 12, 1996.

ADDRESSES: Please submit written comments, in triplicate, to the Director, Policy Directives and Instructions Branch, Immigration and Naturalization Service, 425 "I" Street NW., Room 5307, Washington, DC 20536. To ensure proper handling, please reference INS number 1791-96 on all correspondence. Comments are available for public inspection at the above address by calling (202) 514-3048 to arrange for an appointment.

FOR FURTHER INFORMATION CONTACT:

Brad Glassman, Office of the General Counsel, Immigration and Naturalization Service, 425 "I" Street NW., Room 6100, Washington, DC 20536, telephone (202) 514-2895.

SUPPLEMENTARY INFORMATION: Considerable uncertainty has arisen as to whether plea agreements, cooperation agreements, and other agreements undertaken by agencies other than the Immigration and Naturalization Service (Service) may bind the Service in the exercise of its authority under the immigration laws. The Supreme Court has held that "anyone entering into an agreement with the Government takes the risk of having accurately ascertained that he who purports to act for the Government stays within the bounds of his authority." *Federal Crop Ins. Corp.* v. *Merrill*, 332 U.S. 380, 384 (1947). Accordingly, the Eleventh Circuit has

held that "officials at the INS may initiate deportation proceedings against a particular defendant without considering whether (a) * * * U.S. Attorney has promised the defendant non-deportation as part of a plea agreement." *San Pedro* v. *United States*, 79 F.3d 1065, 1071 (11th Cir. 1996).

However, two United States Courts of Appeals have taken a different view, relying on common law agency principles to enforce a plea agreement and a cooperation agreement against the Service. *Margalli-Olvera* v. *INS*, 43 F.3d 345 (8th Cir. 1994) (plea agreement); *Thomas* v. *INS*, 35 F.3d 1332 (9th Cir. 1994) (cooperation agreement). This rule will clarify which components within the Department of Justice have authority to bind the Department in matters concerning the immigration laws. The consent requirement ensures that favorable treatment under the immigration laws is extended only after a full consideration of its effect on overall immigration enforcement, preserves the authority of the Service to enforce the immigration laws, and prevents the Service from being bound by agreements undertaken without its knowledge and approval. *Cf. Thomas*, 35 F.3d at 1341 ("If the Attorney General wished to limit the incidental authority of United States Attorneys [to bind the Service without its consent], she could easily do so with a section in the Code of Federal Regulations * * *."). This rule codifies a long-standing position of the Department of Justice.

The Attorney General's implementation of this rule as an interim rule, with provision for post-promulgation public comment, is based upon the exception found at 5 U.S.C. 553(b)(3)(A) for "rules of agency organization, procedure, or practice." The

Attorney General certifies, in accordance with 5 U.S.C. 605(b) (1995), that this rule does not have a significant adverse economic impact on a substantial number of small entities. This rule is not considered to be a "significant regulatory action" within the meaning of E.O. 12866, section 3(f), and accordingly has not been reviewed by the Office of Management and Budget. This rule is not considered to have federalism implications warranting the preparation of a Federalism Assessment in accordance with E.O. 12612.

[p. 48,406]

List of Subjects in 28 CFR Part 0

Authority delegations (government agencies), Government employees, Organization and functions (government agencies), Whistleblowing.

Accordingly, part 0 of chapter I of Title 28 of the Code of Federal Regulations is amended as follows:

PART 0—ORGANIZATION OF THE DEPARTMENT OF JUSTICE

1. The authority citation for Part 0 continues to read as follows:

Authority: 5 U.S.C. 301; 28 U.S.C. 509, 510, 515-519.

2. In part 0, subpart CC, a new §0.197 is added to read as follows:

§0.197 Agreements, in connection with criminal proceedings or investigations, promising non-deportation or other immigration benefits.

The Immigration and Naturalization Service (Service) shall not be bound, in the exercise of its authority under the immigration laws, through plea agreements, cooperation agreements, or other agreements with or for the benefit of alien defendants, witnesses, or informants, or other aliens cooperating with the United States Government, except by the authorization of the Commissioner of the Service or the Commissioner's delegate. Both the agreement itself and the necessary authorization must be in writing to be effective, and the authorization shall be attached to the agreement.

Dated: September 9, 1996.

Janet Reno,

Attorney General.

[FR Doc. 96-23491 Filed 9-12-96; 8:45 am]

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In The

Supreme Court of the United States

October Term, 1996

ALBERTO SAN PEDRO,

Petitioner,

vs.

THE UNITED STATES OF AMERICA, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

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REASONS FOR GRANTING THE WRIT

The Government's brief actually strengthens the position of Mr. San Pedro that his petition should be granted by this Court.

The Immigration and Naturalization Service boasts that it won its turf war with the less-powerful and scattered Offices of the United States Attorneys, because it obtained issuance of an interim regulation from the Department of Justice, which, ironically, *permits* United States Attorneys to promise a cooperating criminal defendant as part of a guilty plea agreement that he will not be deported, *but only if* the prosecutor first obtains written approval from the Commissioner of the Immigration and Naturalization Service. That proposed regulation does not dispose of the serious constitutional and statutory issues that affect Mr. San Pedro and all others who obtained plea agreements before this regulation was created.

This case is not moot. The Service has not stopped, and has not offered to stop, the active proceedings to deport Mr. San Pedro. The Immigration and Naturalization Service can not maintain that this new regulation applies retroactively to now make illegal what was done to Mr. San Pedro or anyone else similarly situated. Rather, the Service's tactic is to proclaim that this regulation makes the petition no longer as important as it originally was. The Immigration and Naturalization Service is so wrong.

The legal issue of importance concerns the Constitution and its protection of Mr. San Pedro and other alien criminal defendants against the power of the Immigration

and Naturalization Service. While this new regulation ends the inter-departmental turf war, the promulgation of that new regulation does not undo the promise made to Mr. San Pedro that he would not be deported. Initially, petitioner San Pedro argued that the Government had to keep its fulfillable promise. The Government relegates its response regarding that Due Process Clause argument to a final and terse single paragraph on pages 11 and 12 of its brief. The Government argues that this Court has never held that the Due Process Clause requires the specific performance of any fulfillable promise made by a prosecutor as part of a plea bargain agreement, but only those promises which the prosecutor had actual authority to make. Viewed broadly, a decision by this Court on that issue will affect *all* plea bargaining, no matter what the nature of the agreement is.

If this Court were to limit specific enforcement of a promise to those situations where the prosecutor had actual authority to make the promise, the Government's position begs the underlying question whether the prosecutor in this case had actual authority to make a promise of non-deportation. The Immigration and Naturalization Service subtly suggests that the only source of that authority is the Attorney General of the United States, who is responsible for the promulgation of this interim regulation, who supervises both the Immigration and Naturalization Service and the various Offices of the United States Attorney, and who represents the Government in this Court. Petitioner San Pedro and two lower appellate courts say that a federal prosecutor does have that authority. The issue of the actual authority of the various United States Attorneys depends not on a grant

of power from the Attorney General, but rather a grant of power from Congress! Congress is supreme in the area of deportation. The underlying issue of whether Congress has granted actual authority to federal prosecutors is a very good reason to grant review. The determination of whether Congress granted prosecutors the authority to make the promise of non-deportability requires a construction of several different statutes, none of which either expressly grants or expressly forbids the making of such a promise.

Even if the Immigration and Naturalization Service could obtain a holding from this Court that Congress never granted such authority to prosecutors, this case is still worthy of review. Then, this Court would have to decide the important question of whether a criminal defendant is entitled to specific performance of a plea-bargain promise that was fulfillable and was not expressly forbidden by any act of Congress, when the prosecutor lacked actual authority to make that fulfillable promise.

The Government's brief exposes another subsidiary legal issue that is contained in the questions presented by this petition. On page 8 of the Government's brief, the Government presumes, as did all of the lower courts that addressed this issue, that the concepts of estoppel and apparent authority do not apply to bind the Government, if the person acting for the Government did not have actual authority. This position is based on the belief that two prior holdings from this Court control. Those holdings are stated in two civil litigation cases, *Federal Crop Ins. Corp. v. Merrill*, 332 U.S. 380 (1947) and *Utah Power & Light Co. v. United States*, 243 U.S. 389 (1917). This Court

should resolve whether those two civil cases apply in the criminal context addressed by *Santabello v. New York*, 404 U.S. 257 (1971). It is submitted that a criminal defendant has an actionable due process claim, even if the prosecutor only had apparent authority. The constitutional claim and remedies discussed in *Santabello* incorporate the concepts of estoppel and apparent authority, rather than reject them. A guilty plea based on a breach of a promise is no less a violation of the Due Process Clause, if the prosecutor only had apparent authority to make the promise. This body of law has always focused on inducement of and reliance by the criminal defendant, not on the authority of the promisor to make a particular promise. *See also Raley v. Ohio*, 360 U.S. 423 at 437-439 (1959); *Cox v. Louisiana*, 379 U.S. 559 at 571-572 (1965). The Immigration and Naturalization Service's suggestion to the contrary also warrants this Court's review.[1]

On October 1, 1996, this Court granted review in *Ogbomon v. United States*, U.S. S.Ct. case number 95-8736. The issue presented there involves a construction of a criminal statute, 18 United States Code section 3583(d). That statute is one of the statutes involved in Mr. San Pedro's petition and used by Mr. San Pedro to demonstrate that Congress considers deportation to be a part of federal sentencing and within the domain of the Offices

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[1] This issue will remain in the future, even if this interim regulation becomes law. A prosecutor could still make a promise of non-deportation. That promise might violate this regulation, but could still be relied on to obtain a guilty plea. The fact that the individual prosecutor might be subject to internal sanctions does not salve the injury to the criminal defendant.

of the United States Attorney. The issue involved in *Ogbomon* is whether Congress has granted a federal district court, itself, the power to order deportation as a part of sentencing. Thus, Mr. San Pedro's petition is related to a matter this Court has already deemed worthy of review.

In its brief in *Ogbomon*, the Government called this Court's attention to an amendment of the Immigration and Nationality Act, Title 8, which was passed several years after Mr. San Pedro's guilty plea.[2] That statute, 8 U.S.C. § 1252a(d), expressly provides for judicial deportation at the time a federal criminal sentence is imposed, "if such an order has been requested by the United States Attorney." This statute is yet another indication that Congress has always given federal prosecutors the authority to bargain with federal criminal defendants on the issue of deportability in exchange for a plea of guilty.[3] Because the Office of the United States Attorney is empowered to request deportation as part of its criminal prosecution, a

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[2] Pub. L. No 103-416, § 224(a), 108 Stat. 4305, 4322-4323 (1994).

[3] That statute requires the United States to file a notice of intent to seek deportation prior to the commencement of the trial or the entry of a guilty plea. The United States Attorney is required to serve that notice on both the criminal defendant and the Immigration and Naturalization Service. Congress requires the Commissioner of the Service to concur in the prosecutor's request prior to sentencing. However, if the United States Attorney does not request deportation in that criminal proceeding, Congress has not given the Service authority to do so in that criminal proceeding. Based on this statute, it is now obvious that a criminal defendant can bargain with the prosecutor, to obtain a promise from the prosecutor that the Government would not request deportation.

prosecutor can bargain away that request in exchange for a guilty plea. Consequently, Congress has made it likely that the issue presented by Mr. San Pedro's petition can appear in the future.

In footnote 6 of the brief for the United States in opposition to the granting of this petition, the Government asserts that this case should not be reviewed, because, as a matter of fact, there was no promise made by the prosecution that Mr. San Pedro would not be deported. The trial court entered a summary judgment, but not on the basis that no promise was made. Indeed, at the only trial court hearing prior to the entry of the order granting summary judgment, the trial judge stated, based on the evidence before her: ". . . I'm convinced that there are enough disputed issues of fact about whether a promise was made or not,. . . . " (1st Supp. R. Vol. 1 at page 20). No decisive factual finding was made by the district court, because this case was decided on the Government's motion for a summary judgment, because there was a factual dispute on the issue of whether a promise was made, and because the law regarding summary judgments required the trial court to resolve that factual dispute in favor of Mr. San Pedro. Because there has yet been no trial on this factual issue, it is inappropriate for the Government to seek to avoid review by an assertion that no promise was made.

The final arbiter of the Constitution must be this Court, not the Immigration and Naturalization Service. The Service should not be able to outmaneuver the Justices of this Court by promulgating a regulation, which really does no more than mask the issues. It is obvious that the questions concerning the Due Process Clause and

plea bargaining, as well as the issue of the authority of federal prosecutors in the area of deportation, are of continuing national importance.

CONCLUSION

For the above-stated reasons and those presented in the original petition, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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